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

REPLY BRIEF OF PETITIONER ON REVIEW, STATE OF OREGON

Appeal from the Judgment of the Circuit Court
for Marion County
Honorable THOMAS M. HART, Judge

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PETITIONER'S REPLY BRIEF

SUMMARY OF ARGUMENT

The state has asserted that this court, before it issued *State v. Hall*, 339 Or 7, 115 P3d 908 (2005), "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." (Pet BOM 18). The state also has asserted that, because the suppression rule announced in *Hall* is relatively new, "'[p]assage of time' and 'precedential use' considerations do not weigh against reconsideration." (Pet BOM 18).

In response, defendant asserts that this court—"[f]or decades"—has recognized that a police illegality can require suppression of evidence found during a consent search, even if consent was "voluntary" for constitutional purposes. (Resp BOM 15). To support that assertion, defendant cites *State v. Crandall*, 340 Or 645, 136 P3d 30 (2006); *State v. Olson*, 287 Or 157, 598 P2d 670 (1979); *State v. Williamson*, 307 Or 621, 772 P2d 404 (1989); *State v. Kennedy*, 290 Or 493, 624 P2d 99 (1981); and *State v. Rodriguez*, 317 Or 27, 854 P2d 399 (1993). (Resp BOM 16-21). *Crandall*, of course, was decided after *Hall*, and it thus sheds no light on this court's pre-*Hall* understanding of Article I, section 9's exclusionary rule. Moreover, none of the other four

decisions that defendant relies on conflicts with the state's characterization of this court's pre-*Hall* case law.

ARGUMENT

A. *State v. Olson* did not apply Article I, section 9's exclusionary rule and did not involve a consent search.

The *Olson* decision addressed police conduct that violated both Article I, section 9 and the Fourth Amendment, but it ultimately applied the Fourth Amendment suppression rule exclusively. *See* 287 Or at 164-66 (citing *Brown v. Illinois*, 422 US 590, 95 S Ct 2254, 45 L Ed 2d 416 (1975), to explain why the defendant's statements should be suppressed, but citing neither Oregon case law nor Article I, section 9 as justification). *Olson* did not apply Article I, section 9's exclusionary rule at all. 287 Or at 166.

Moreover, *Olson* did not involve a consent search. *See* 287 Or at 164-66 (addressing admissibility of statements made by the defendant, and addressing whether probable cause to arrest or exigent circumstances justified warrantless entry into the defendant's home, but not addressing whether consent authorized entry). In short, *Olson* did not hold that, if police violate a defendant's Article I, section 9 rights but then obtain voluntary consent to a search, suppression of evidence found during the search might be required.

B. *State v. Williamson* did not hold that evidence found during a voluntary-consent search can be suppressed based on a preceding illegality.

As defendant acknowledges, the *Williamson* court held that suppression was required because "the consent in that case was involuntary." (Resp BOM 18-19); *see also Rodriguez*, 317 Or at 40 and n 14 (*Williamson* "impliedly was based on a voluntariness analysis," and "the tenor of the opinion suggests that it was based on grounds of voluntariness"). The court confined itself to discussing the dividing line between voluntary consents and consents that are rendered involuntary by unlawful police conduct. *See Williamson*, 307 Or at 626 ("[w]e do not hold that consent can never legitimize a search when the occasion to give or refuse consent followed some unauthorized act of the police"; "[w]e hold only that a search is not legitimized by consent obtained under the pressure of police action that became available to police only by the prior unauthorized conduct"). Because the *Williamson* court held that the defendant's consent was not voluntary, it did not address—one way or the other—whether suppression can be required even when a defendant has consented voluntarily. 307 Or at 626.

C. *State v. Kennedy* reflected that if voluntary consent followed a police illegality, evidence found during the consent search necessarily was admissible.

Defendant notes that the *Kennedy* court made the following statement: "Courts have consistently held that evidence discovered by * * * a [consent]

search is not to be automatically suppressed as 'fruit of the poisonous tree,' but instead have stated that the evidence is to be suppressed only if it is found that the consent was gained by exploitation of the illegality or that defendant's free will was tainted by the illegal police conduct." *Kennedy*, 290 Or at 501. Defendant views that statement as a signal that this court concluded—24 years before it issued *Hall*—that when consent follows illegal police conduct, courts must assess both the voluntariness of the consent *and* whether officers "exploited" the illegal conduct in obtaining the consent. (*See* Resp BOM 18: *Kennedy* "stated the two-pronged test for attenuation"). Defendant is mistaken.

First, in writing the sentence quoted above, and in describing what "[c]ourts have consistently held," the *Kennedy* court merely described what courts in other jurisdictions had held. *See* 290 Or at 501 (citing—immediately after that sentence—four state court decisions and two Fifth Circuit decisions). That sentence did not purport to describe holdings that had construed or applied Article I, section 9's exclusionary rule. *Id.*

Admittedly, the *Kennedy* court then stated that this court had applied "the same analysis" in two previous cases—*State v. Quinn*, 290 Or 383, 623 P2d 630 (1981), *overruled by Hall*, 339 Or at 27, 30; and *State v. Warner*, 284 Or 147, 585 P2d 681 (1978). *Kennedy*, 290 Or at 501. Yet it described the analysis in *Quinn* and *Warner* as focused *exclusively* on assessing whether the consent to the search was "voluntary." It noted that in *Quinn*, although "police sought

[the] defendant's consent to a search as the result of observations made by the officers during a prior illegal search," "[w]e found * * * that [the] defendant's consent to the second search was voluntary and that the evidence discovered during that search was admissible." *Kennedy*, 290 Or at 501. Nothing in that description suggested that the *Quinn* court—once it had deemed the defendant's consent voluntary—had perceived a need to engage in any additional analysis. *Kennedy*, 290 Or at 501.

The *Kennedy* court similarly noted that in *Warner*, although the defendant had been "illegally 'stopped' by police," "the court did not hold that the illegality alone required suppression of evidence discovered during a search to which defendant [subsequently] consented." *Kennedy*, 290 Or at 501. The *Warner* court instead "examined the totality of the facts and circumstances at the time of the consent *to see whether it was voluntary*." *Kennedy*, 290 Or at 501 (emphasis added). Nothing in that description of *Warner* suggested that—if a court deemed consent to a search voluntary—further inquiry was required.

Moreover, the manner in which the *Kennedy* court resolved the particular issue before it further reflected that, once consent to a search is deemed voluntary, Article I, section 9's exclusionary rule required no further analysis. The court explained that, if officers obtain consent to search "during an illegal stop," "the proper approach"—in assessing whether evidence found during the consent search must be suppressed—"is to examine the totality of the facts and

circumstances and to determine, based upon that examination, whether [the] defendant's consent to the search was voluntary." 290 Or at 501. Elsewhere in the decision, the court framed the dispositive inquiry similarly: "If the encounter between the police and defendant was a 'stop' unjustified by reasonable suspicion, was the search so 'tainted' by the unjustified 'stop' as to be illegal despite defendant's consent, or was defendant's consent sufficiently voluntary to validate the search?" 290 Or at 496. The court then "[h]eld that [the] defendant's consent to the search of his luggage was voluntary," and concluded that the trial court had erroneously granted the defendant's motion to suppress. *Id.* at 506.

In short, because the defendant in *Kennedy* had consented voluntarily to a search of his luggage, the court deemed the search constitutionally valid, and it conducted no further analysis. 290 Or at 506. It therefore concluded—at least implicitly—that if consent to a search is voluntary, Article I, section 9's exclusionary rule required no further analysis.

D. Although *State v. Rodriguez* suggested that voluntariness and exploitation reflect separate inquiries, it did not overrule *Kennedy* or *State v. Quinn*, which had deemed voluntary consents dispositive by themselves.

The *Rodriguez* court stated—without citing any direct authority for the proposition—that if a defendant voluntarily consents to a search, "[t]here *may* be cases" in which a prior illegality affects the admissibility of evidence found

during the search. 317 Or at 39 (emphasis added). The *Rodriguez* court also suggested—again, without citing any direct authority[1]—that "voluntariness" and "exploitation" are separate inquiries. *See* 317 Or at 38 (noting the "distinction that we make here between voluntariness and exploitation"). *Rodriguez* did not, however, purport to overrule *Kennedy* or *Quinn*, in which this court had deemed voluntary consents to a search as dispositive, and as not requiring further inquiry. *See Kennedy*, 290 Or at 506 (describing the defendant's consent as voluntary, and concluding that trial court erred by suppressing evidence found during the consent search); *Quinn*, 290 Or at 394, 396 (because defendant was unaware of illegal initial search, that search did not "influence" his consent to a later search, and Article I, section 9 did not require exclusion of the evidence found during the later search; the evidence was admissible because the consent "was voluntarily given, uninfluenced and untainted by the earlier unlawful act").[2] Indeed, had *Quinn* not still been "good

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[1] The *Rodriguez* court did cite *State v. Davis*, 313 Or 246, 253, 834 P2d 1008 (1992), for the general proposition that "evidence is subject to suppression in a criminal prosecution if it was 'obtained in violation of a defendant's rights under [Article I, section 9].'" *Rodriguez*, 317 Or at 39. In addition, the court asserted that "the result in [*Williamson*] may also be explained as based on an exploitation analysis," but it acknowledged that *Williamson* nonetheless "impliedly was based on a voluntariness analysis," and that "the tenor of the opinion suggests that it was based on grounds of voluntariness." 317 Or at 40-41 and n 14.

[2] A year after it issued *Rodriguez*, this court made it clear that neither *Rodriguez* nor any other decision had overruled *Quinn*. *See State v.*

Footnote continued…

law" as of 2005, the *Hall* court would have had no need to expressly overrule it. *See Hall*, 339 Or at 27 ("we * * * overrule expressly [the suppression] part of this court's decision in *Quinn*"); *id.* at 30 (not disputing that the defendant in *Quinn* gave voluntary consent to a search, but holding that *Quinn*'s ultimate suppression holding "is untenable under Article I, section 9").

In addition, *Rodriguez* cannot be described as a case in which this court required suppression despite a voluntary consent to the search at issue. *See* 317 Or at 41-42 (concluding that suppression could not be justified because police did not exploit the defendant's illegal arrest of the defendant to obtain his consent to a search). At most, *Rodriguez* identified a theoretical possibility that, in some future case, the court *might* require suppression despite a voluntary consent. *See* 317 Or at 39 ("where the court has determined that the consent was voluntary, unlawful police conduct occurring before a consent search still *may* affect the admissibility of evidence seized during the search"; emphasis added).

At most, *Rodriguez* reflects a degree of inconsistency in this court's pre-*Hall* discussions of Article I, section 9's exclusionary rule. Again, however, neither *Rodriguez* nor any other pre-*Hall* decision purported to overrule

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(...continued)
Weaver, 319 Or 212, 221 n 9, 874 P2d 1322 (1994) ("[o]ur disposition of this case does not require us to reexamine whether *State v. Quinn* * * * remains a valid statement of search and seizure law").

Kennedy or *Quinn*, in which voluntary consents were deemed dispositive despite a prior police illegality. *Hall*'s suppression holding—and its declaration that suppression can result despite voluntary consent to a search—marked a departure from existing case law. The suppression rule that *Hall* announced is relatively new, and this court should not hesitate to revisit it.

CONCLUSION

For the reasons recounted in both the state's opening brief and in this brief, this court should revisit and overrule *Hall*'s suppression holding.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on August 12, 2013, I directed the original Reply Brief 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 2,042 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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