IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. JEFFERY LORENZO, Defendant-Appellant, Respondent on Review.	Washington County Circuit Court No. C100238CR CA A145826 SC S060969

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 Washington County
Honorable STEVEN L. PRICE, Judge

Opinion Filed: September 12, 2012
Before: Presiding Judge Ortega, Chief Judge Brewer, and Judge Sercombe
Author of Opinion: Presiding Judge Ortega

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PETER GARTLAN #870467
Chief Defender
Office of Public Defense Services
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email:
peter.gartlan@opds.state.or.us

Attorneys for Defendant-Appellant/
Respondent on Review

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA M. JOYCE #013112
Solicitor General
ROLF C. MOAN #924077
Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email:
rolf.moan@doj.state.or.us

Attorneys for Plaintiff-Respondent/
Petitioner on Review

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PETITIONER ON REVIEW'S BRIEF ON THE MERITS

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 trying to contact defendant to check on his welfare, a police officer violated Article I, section 9, by reaching inside defendant's apartment door and knocking on his bedroom door. While doing so, the officer did not observe anything suspicious or incriminating. By the time defendant emerged from his room, the officer had retreated outside the apartment. The officer asked if he could speak to defendant inside the apartment, defendant voluntarily consented, and the officer—after he stepped inside the apartment—smelled and observed marijuana. He then asked to search defendant's room, and defendant voluntarily consented. Did the initial police illegality in knocking on the bedroom door require suppression of the evidence discovered after defendant's consents?

Third proposed rule of law

The record shows that defendant's consents were voluntary, and that nothing about the police illegality significantly affected defendant's decisions to consent. Accordingly, the police illegality 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 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: namely, 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 acted unlawfully by reaching into defendant's apartment to knock on his bedroom door, defendant—upon emerging and seeing the officers outside his apartment—voluntarily consented when they asked to enter the apartment. After the officer entered, he smelled and observed marijuana. Defendant then voluntarily consented to a search of his bedroom that revealed additional incriminating evidence. Because defendant's consents were voluntary, they rendered 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 preceding police illegality significantly affected his decisions to consent. The preceding illegality—the knocking on the bedroom door—occurred only after officers had encountered defendant's suicidal roommate outside, and after they received no response when knocking

on the apartment door for the purpose of checking on defendant's welfare. The illegality was of short duration, and it had terminated by the time defendant emerged from his room; by then, the officers were fully outside the apartment. At that point, moreover, the officers had not yet observed anything suspicious or incriminating. As a result, defendant found himself in the same circumstances—with respect to the evidence at issue, and with respect to his ability to keep the officers from entering his apartment—that would have existed had he responded to the initial, lawful knock on his apartment door.

Further, nothing about the illegal knocking on the bedroom door was likely to affect the subsequent decisions to consent. While knocking on the bedroom door, an officer asked defendant if he was "okay" and identified himself as a police officer. That conduct, rather than reflecting aggressive behavior likely to coerce defendant's cooperation, merely conveyed that the officers were inquiring about defendant's welfare. It was not likely to affect defendant's ability to freely consent to a request to enter or search his property.

Similarly, nothing about the officers' behavior *after* the illegality reflected an attempt to exploit the preceding illegality to obtain consent. Instead, the officer who knocked on the bedroom door retreated outside the apartment and—while still outside—simply asked, "Can I come in and talk to you?"

In light of all the circumstances, nothing suggests that the police illegality significantly affected defendant's consent to the entry into his apartment, or significantly affected his consent to the search of his bedroom. Article I, section 9, provides no basis for suppression.

SUMMARY OF MATERIAL FACTS

A. While possessing no warrant, officers reached into defendant's apartment to knock on his bedroom door.

Officers reported to defendant's apartment complex at roughly 7:00 one morning because they were trying to contact defendant's roommate—a man named Kyle. (Tr 13-15, 126). Kyle's ex-fiancee had called police to report that Kyle had a "noose around his neck" and "was trying to hang himself." (Tr 14, 126). After officers encountered Kyle outside the apartment complex and removed the noose, they learned that defendant was unaccounted for. (Tr 20-21, 97-99). The ex-fiancee, who lived nearby, had not yet seen defendant that morning. (Tr 134). Defendant remained unaccounted for even after officers knocked on his apartment door and called out "Jeff, are you okay," and even after Kyle's ex-fiancee placed "one or two calls" to defendant's phone. (Tr 22).

One of the officers, Officer Wujcik, testified that "when we get called to suicidals, * * * sometimes they're suicidal because they have hurt somebody or killed somebody." (Tr 21). Officers also knew that Kyle kept a "rifle type gun" in the apartment. (Tr 109). Based on "concerns * * * about [defendant]'s

safety," Officer Wujcik reached inside defendant's front door and knocked on defendant's bedroom door, which was "right next" to the front door. (Tr 23, 24).[1] The officer said, "Police, Jeff, are you okay * * * ." (Tr 27).

The officer's feet were still "outside the [apartment] door" when he reached inside to knock on defendant's bedroom door. (Tr 28). Nothing suggests that Officer Wujcik observed anything incriminating while knocking on defendant's bedroom door.

Defendant emerged from his bedroom and, by the time he did so, Officer Wujcik was completely outside the apartment. (*See* Tr 215, containing trial court's finding that, when defendant emerged, "[t]he officer from the outside of the threshold says, 'Are you Jeff, are you okay?'"; Tr 27, containing Officer Wujcik's testimony that, after he knocked on the bedroom door, defendant "walk[ed] out of his room and into an area where [the officer] can see him from the front door"; Tr 28, containing testimony that officer's feet had remained "outside" the front door even while he was knocking on the bedroom door, and

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[1] Although the trial court commented that "I don't know if the door was open," Officer Wujcik testified that the door was already open about eight inches. (Tr 21). The trial court stated that it would "assume for the sake of argument" that the officer opened the apartment door, but it did not affirmatively find that the door was closed when Officer Wujcik encountered it. (Tr 215).

that officer was "still standing outside the door" when defendant "comes around to talk to you").[2]

B. Defendant consented to a request to enter his apartment, and he then consented to a search of his bedroom.

After defendant emerged from his bedroom, Officer Wujcik asked "if he was okay," and defendant said, "[Y]eah, he was." (Tr 28). The officer asked, "Can I come in and talk to you?" (Tr 27). Defendant said, "[Y]es," and gave "consent to enter." (Tr 27, 29).

Officer Wujcik entered the apartment but remained outside defendant's bedroom. (Tr 27-32). At that point, the officer smelled marijuana "coming from [defendant's] room." (Tr 29). As a result, the officer asked defendant for his identification. *State v. Lorenzo*, 252 Or App 263, 265, 287 P3d 1133 (2012), *rev allowed*, ___ Or ___ (May 16, 2013). While defendant was looking for his identification, the officer saw a baggie on the bedroom floor that "looked * * * to contain marijuana." (Tr 30-32). The officer told defendant "that I knew there was marijuana in the room" and asked "if he was selling marijuana," and defendant said he was not. (Tr 33). The officer asked, "Can I make sure you're not selling it by searching your room?" (Tr 33-34).

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[2] Defendant has never suggested that, when he emerged from his bedroom, any part of Officer Wujcik's body was inside his apartment.

Defendant "said, 'Yes,' and he motioned towards the door and stepped away[,] * * * making room for [the officer] to go in." (Tr 33).

Officer Wujcik did not "make any threats, promises, anything like that to" defendant. (Tr 33). Defendant was not "physically detained" when the officer asked for consent to search the bedroom, and the officer did not "have any weapons out." (Tr 33).

Inside the bedroom, officers found marijuana, "drug records," a digital scale with marijuana leaves on it, and a pistol. (Tr 34-36). The state subsequently charged defendant with unlawful manufacture of marijuana, unlawful delivery of marijuana, and felon in possession of a firearm. (ER-1, Information).

C. Although the trial court denied defendant's motion to suppress the evidence found in his bedroom, the Court of Appeals reversed.

Defendant moved to suppress all evidence obtained as a result of the "search of the residence." (Motion to Suppress at 1). He argued that the officers conducted an illegal warrantless search by reaching into his apartment and knocking on his bedroom door, and that officers exploited that illegality to obtain defendant's consents. (Tr 197-98). He argued that the illegality rendered his consents invalid. (Tr 197). In response, the state argued that defendant's consent "was knowing[] and voluntary," that the warrantless conduct in reaching inside the apartment was justified by the emergency-aid

exception to the warrant requirement, and that the evidence at issue was not obtained via exploitation of any police illegality. (Tr 179-82, 216-17).

The trial court denied the motion to suppress, concluding that emergency-aid principles justified the intrusion into the apartment, and that no police illegality preceded defendant's consents. (Tr 214, 217). The trial court did not address the exploitation issue "because [it] found that the emergency aid doctrine applied." (Tr 217). Although the court did not expressly address whether defendant's consents were voluntary, it implicitly must have deemed them voluntary, given the state's theory that voluntary consent authorized the discovery of the evidence at issue, and given that it denied the motion to suppress. *See Hall*, 339 Or at 20 (Article I, section 9, requires that "in any case in which the state relies upon a defendant's consent to validate a warrantless search, the state must prove by a preponderance of the evidence that the defendant's consent was voluntary"). Following a bench trial, the trial court convicted defendant of manufacture of a controlled substance, delivery of a controlled substance, and felon in possession of a firearm. (ER-3, Judgment).

On appeal, defendant did not challenge the implicit ruling that his consents were voluntary, or suggest that his consents were anything but voluntary. (App Br 2-4, 24-25). Defendant instead argued that officers had conducted an unlawful warrantless search by reaching inside his apartment to knock on his bedroom door, and that the subsequently-discovered evidence

"was the product of the unlawful search." (App Br 2-4, 24-25; bold and capital letters omitted). The state argued that, because defendant consented voluntarily, "no 'exploitation' analysis should be necessary"; that "suppression—as a matter of law—[thus] cannot be required by the state constitution"; and that, even if voluntary consent alone did not automatically defeat defendant's suppression argument, no exploitation had occurred. (Resp Br 5 n 1, 13).

The Court of Appeals agreed with defendant. It first held—in a ruling that the state is not challenging—that officers violated Article I, section 9, by reaching inside defendant's front door to knock on his bedroom door. 252 Or App at 265-68.

The Court of Appeals then held that, due to the initial illegal entry (the knocking on the bedroom door), *Hall* required suppression of the evidence at issue. Under the first step in *Hall*'s two-step inquiry, the Court of Appeals held that defendant showed a "minimal factual nexus" between the knocking on the door and defendant's subsequent consent: "The officer was able to contact defendant and seek his consent to the search only by effecting a warrantless entry into his apartment." 252 Or App at 270.

Under *Hall*'s second step, the Court of Appeals held that suppression was required because "the state failed to demonstrate that defendant's consent was independent of, or only tenuously related to, the preceding illegal police

conduct." 252 Or App at 270. The court again emphasized that—but for the illegal knocking—the officer would not have been "in a position to speak with defendant." *See* 252 Or App at 271 ("[i]t was only by means of the unlawful entry into the apartment that the officer was in a position to speak with defendant, ask to enter the apartment, observe the marijuana, and ask for consent to search"). The court also emphasized the temporal connection between the initial illegality and the consent to the search: "The events leading up to defendant's consent to the search of his bedroom flowed quickly and directly from the officer's entry into the apartment." 252 Or App at 270.

ARGUMENT

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

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.[3]

Hall's suppression rule is just eight years old. This court has applied the rule just four times,[4] and—setting aside the vacated *Hemenway* decision—this is, in essence, the first time the court has granted a petition for review asking it

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[3] 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).

[4] 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.

to revisit *Hall*.[5] This case thus resembles *Stranahan*, in which the court "acted at the 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

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[5] The court granted the state's petition for review in this case on May 16, 2013. On April 25, 2013, the court granted the state's petitions for review in *State v. Musser* S060868, and in *State v. Unger* S060888, two other cases in which the state has asked the court to revisit *Hall*'s suppression holding. This court has scheduled all three cases for argument at 9:00 on September 17, 2013.

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* mis-applied 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]

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.

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

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 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 reasonable as a matter of law, neither suppression nor any other remedy can be required to give effect to—or to "vindicate"—a 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]

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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]conformable or agreeable to reason; just; rational"); Noah Webster, *An American Dictionary of the English Language* (1830) (defining "reasonable" as, among other things, "[n]ot 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 the person's 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").

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 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

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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).

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 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 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 unlawfully intruded into defendant's apartment before obtaining consent to enter the apartment and search his bedroom, that conduct did not require suppression.

Here, it is undisputed that police effected an unlawful search by reaching into defendant's apartment and knocking on his bedroom door without a warrant. It also is undisputed that defendant consented voluntarily—for constitutional purposes—to the subsequent entry into his apartment, and to the subsequent search of his bedroom. Correct application of Article I, section 9's exclusionary rule reveals no basis for suppressing the discovered evidence.

First, defendant's voluntary consents—by themselves—rendered the officers' ensuing conduct lawful, and precluded any need to suppress the evidence that they discovered.

Second, even if this court rejects that proposition, the challenged evidence is admissible. Aside from demonstrating that defendant's consents were voluntary, the record shows no basis for concluding that the police illegality significantly affected the decisions to consent. The record shows that the police illegality—the act of knocking on defendant's door—was of extremely short duration. By the time defendant emerged from his bedroom and saw the officers, any unlawful intrusion had terminated, and officers were

back outside the apartment door. (*See* Tr 215, containing trial court's finding that, when defendant emerged, "[t]he officer from the outside of the threshold says, 'Are you Jeff, are you okay?'"). At that point, the officers had not yet observed anything suspicious or incriminating. Consequently, defendant occupied the same position that he would have occupied had he responded to a lawful knock on his apartment door—that is, the officers were completely outside his apartment, defendant was inside the apartment, and defendant was not subject to any form of restraint. Nothing about the knocking on the bedroom door had compromised defendant's ability to keep the officers from entering his apartment, or impaired his ability to prevent them from discovering the evidence at issue.

Furthermore, nothing suggests that the officers' initial illegal conduct was aggressive or intended to intimidate. Instead, the officer who knocked on defendant's bedroom door did so while asking if defendant "was okay," and while identifying himself as a police officer. (Tr 23-24, 27). Although illegal, the officer's conduct was not likely to coerce defendant's cooperation or consent to a further intrusion onto his property. The officer's conduct merely conveyed that officers were attempting to contact defendant, and were curious about his welfare. That conduct did not significantly affect defendant's decision to consent.

Finally, nothing about the officers' behavior following the knocking on the bedroom door reflected an attempt to exploit the illegality to obtain consent. When defendant emerged, Officer Wujcik again asked "if [defendant] was okay." (Tr 28). When defendant said, "[Y]eah, he was," the officer simply asked, "Can I come in and talk to you?" (Tr 27-28). The officer's conduct, rather than reflecting an attempt to intimidate defendant, reflected continuing concern for defendant's welfare. The officer made no effort to exploit the earlier illegality to influence defendant's decision to let them speak with him inside the apartment. The record reflects no basis for concluding that the illegality significantly affected defendant's consent to the request to enter the apartment.

As a result, defendant's voluntary consent to that entry entitled Officer Wujcik to enter the apartment, and it thus entitled the officer—while just inside the front door, and while still outside defendant's bedroom—to smell marijuana coming from defendant's bedroom, and to observe a baggie in the bedroom that appeared to contain marijuana. (Tr 29-32). Because defendant's voluntary consent was not significantly affected by the earlier illegality, it authorized the entry that led to those observations. Article I, section 9, provides no basis to suppress evidence of those observations.

It follows that Officer Wujcik also acted lawfully by informing defendant of those observations before asking for consent to search the bedroom. (*See* Tr

33-34, containing officer's testimony that he told defendant that he "knew there was marijuana in the room," and that he asked if he could search the bedroom to ensure that defendant was not selling marijuana). Because the officer lawfully shared those observations, defendant's subsequent consent—which led to the discovery of incriminating evidence in his bedroom—was not the product of an Article I, section 9 violation. Hence, the evidence found in the bedroom also is admissible.[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—at the very least—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 the consent search.

Here, defendant voluntarily consented to the entry into his apartment, and he voluntarily consented to a search of his bedroom. Because nothing suggests

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[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).

that the police illegality that preceded those consents significantly affected the decisions to consent, the discovered evidence is admissible. This court should reverse the Court of Appeals' decision and affirm the trial court's judgment.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
ANNA M. JOYCE
Solicitor General

/s/ Rolf C. Moan
ROLF C. MOAN #924077
Assistant Attorney General
rolf.moan@doj.state.or.us

Attorneys for Plaintiff-Respondent/
Petitioner on Review
State of Oregon

RCM:blt/4387476

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on June 27, 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 Peter Gartlan, 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 8,392 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).

/s/ Rolf C. Moan

ROLF C. MOAN #924077
Assistant Attorney General
rolf.moan@doj.state.or.us

Attorney for Plaintiff-Respondent/
Petitioner on Review
State of Oregon

RCM:blt/4387476