

Filed: January 10, 2013

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

v.

LELAND JAY HEMENWAY,

Respondent on Review,

Petitioner on Review.

(CC 071107; CA A136981; SC S059085 (Control))

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STATE OF OREGON,

v.

LELAND JAY HEMENWAY,

Petitioner on Review,

Respondent on Review.

(S059392)  
(Consolidated)

On review from the Court of Appeals.\*

Argued and submitted November 14, 2011, at Reynolds High School, Troutdale, Oregon.

Rolf Moan, Assistant Attorney General, Salem, argued the cause and filed the brief for State of Oregon, respondent on review/petitioner on review. With him on the brief were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

Peter Gartlan, Chief Defender, Office of Public Defense Services, Salem, argued the cause and filed the brief for Leland Jay Hemenway, petitioner on review/respondent on review.

Before Balmer, Chief Justice, Kistler, Walters, Linder, and Landau, Justices, and Durham and De Muniz, Senior Judges, Justices pro tempore.\*\*

BALMER, C. J.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is affirmed.

Landau, J., concurred and filed an opinion.

Walters, J., dissented and filed an opinion, in which De Muniz, Senior Judge, Justice pro tempore, joined.

\*Appeal from Tillamook County Circuit Court, Rick W. Roll, Judge. 232 Or App 407, 222 P3d 1103 (2009).

\*\*Brewer and Baldwin, JJ., did not participate in the consideration or decision of this case.

1 BALMER, C. J.

2 This case requires us to consider once again the circumstances in which a  
3 person's voluntary consent to a search is the result of exploitation of prior illegal police  
4 conduct -- leading to the exclusion of the evidence obtained -- and when it is not. The  
5 state charged defendant with possession of methamphetamine. Before trial, defendant  
6 filed a motion to suppress evidence seized by the police, arguing that his consent to  
7 search was the product of an illegal seizure and, therefore, that the evidence was  
8 inadmissible under Article I, section 9, of the Oregon Constitution.<sup>1</sup> The trial court  
9 denied the motion. Defendant entered a conditional guilty plea, reserving his right to  
10 appeal the denial of his motion to suppress. The Court of Appeals reversed, relying in  
11 part on our decision in [State v. Hall](#), 339 Or 7, 115 P3d 908 (2005), and holding that, if  
12 the stop was unlawful, the evidence from the search was presumptively obtained through  
13 exploitation of the earlier unlawful conduct. [State v. Hemenway](#), 232 Or App 407, 222  
14 P3d 1103 (2009). For the reasons that follow, we reverse the decision of the Court of  
15 Appeals. In doing so, we modify the exploitation analysis announced in *Hall*.

16 BACKGROUND

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<sup>1</sup> Article I, section 9, of the Oregon Constitution provides:

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

1 We take the facts from the Court of Appeals opinion.

2 "In April 2007, deputies Orella and Russell responded to a call from Taylor,  
3 defendant's girlfriend, regarding the Taylor residence's electric power and  
4 the whereabouts of Taylor's son. The deputies, in separate cars, arrived at  
5 Taylor's residence just before midnight. Both deputies parked in the  
6 driveway behind defendant's truck, blocking the truck's exit route. The  
7 deputies were in uniform, carrying guns, and driving marked sheriff's  
8 vehicles. Defendant and Taylor were both outside the house when the  
9 deputies arrived. Deputy Orella approached Taylor and instructed  
10 defendant to go talk to Deputy Russell. Orella then informed Russell that  
11 he had observed a rifle in defendant's truck.

12 "Defendant met Russell near the back of the truck and voluntarily  
13 explained that he was in the process of moving out of the house and many  
14 of his belongings were in the truck, including the rifle and a handgun.  
15 Russell asked defendant if he was a felon; defendant responded that he was  
16 not. In order to verify defendant's assertion that he was not a felon, Russell  
17 asked for defendant's name and date of birth. Defendant provided the  
18 information to Russell. Defendant asked Russell's permission to have a  
19 cigarette. Russell said that he could, but that he wanted to search defendant  
20 to 'ease his mind.' Defendant agreed to that search. Russell found a breath  
21 mint tin in one of defendant's pockets. The trial court found that Russell  
22 first asked if he could open the tin, and, after defendant agreed, Russell  
23 discovered a methamphetamine pipe and a baggie that Russell suspected  
24 contained methamphetamine residue. Russell placed defendant under arrest  
25 and advised him of his *Miranda* rights.

26 "Russell then asked defendant if he had more drugs in the house.  
27 Defendant admitted that there might be and consented to Russell retrieving  
28 the drug-related items from the house. Defendant accompanied Russell  
29 into the house and pointed out where the methamphetamine paraphernalia  
30 was, which Russell then located and seized.

31 "Before trial, defendant moved to suppress all evidence obtained  
32 from the warrantless search of his person and residence and his inculpatory  
33 statements made to the deputies. Defendant argued that the deputies'  
34 conduct before his grants of consent and statements constituted an unlawful  
35 stop under Article I, section 9, of the Oregon Constitution and that Russell  
36 exploited the unlawful stop when he obtained defendant's consents and  
37 statements. The trial court determined that defendant was not 'seized' by  
38 Russell and that defendant's consents were voluntary. Defendant entered a  
39 conditional plea of guilty, reserving the right to appeal the trial court's

1 denial of his motion to suppress."

2 *Id.* at 409-10.

3 On appeal, defendant argued that the trial court erred by holding that  
4 defendant had not been seized; defendant did not challenge the trial court's finding that he  
5 voluntarily had consented to the searches. The Court of Appeals determined that (1) the  
6 officers did not have reasonable suspicion that defendant had engaged in criminal  
7 activity; and (2) a reasonable person in defendant's position would have believed that he  
8 had been stopped, "[g]iven that defendant was physically blocked from exiting in his  
9 truck by the deputies' cars, that he was told to speak to Russell and had to alter his course  
10 to do so, and that Russell asked if defendant was a felon and subsequently asked for his  
11 verifying information." *Id.* at 415. The court nevertheless remanded defendant's case for  
12 the trial court to determine whether defendant subjectively had believed that he had been  
13 stopped. *Id.* Under this court's case law at the time of the Court of Appeals decision, a  
14 seizure for purposes of Article I, section 9, occurred whenever an individual subjectively  
15 "believe[d]" that a law enforcement officer had restrained that individual's liberty or  
16 freedom of movement and such belief was objectively reasonable. *See State v. Holmes*,  
17 311 Or 400, 409-10, 813 P2d 28 (1991), *overruled in part by State v. Ashbaugh*, 349 Or  
18 297, 316, 244 P3d 360 (2010).

19 Turning to the question whether, if defendant had been unlawfully stopped,  
20 the evidence from the consent searches should have been suppressed, the Court of  
21 Appeals held that it should. *Hemenway*, 232 Or at 416-18. Applying *Hall*, the court held  
22 that the state had failed to show that defendant's voluntary consents were attenuated from

1 the potentially illegal stop. For that reason, if the stop was unlawful, the evidence was  
2 obtained through exploitation and should have been suppressed.

3 Defendant and the state each requested an extension of time to file their  
4 respective petitions for review pending this court's decision in *Ashbaugh*. In that case,  
5 we modified the test for whether the police have seized a person for purposes of Article I,  
6 section 9, eliminating the subjective component of the test. *Ashbaugh*, 349 Or at 316.  
7 After the opinion in *Ashbaugh* issued, defendant and the state both petitioned for review  
8 in these cases. Defendant argued that, under *Ashbaugh*, this court should reverse the part  
9 of the Court of Appeals opinion that remanded his case to the trial court for an  
10 investigation into his subjective belief regarding whether he had been stopped and should  
11 order the suppression of the drug evidence under *Hall*. The state conceded that defendant  
12 had been stopped under Article I, section 9, as explained in *Ashbaugh*, but asserted that  
13 *Hall* was incorrectly decided and should be overruled. We consolidated the petitions and  
14 allowed review.

15 On review, the state argues that *Hall* -- discussed further below -- was  
16 incorrectly decided because a voluntary consent search is necessarily "reasonable" under  
17 Article I, section 9, of the Oregon Constitution and, thus, any evidence seized pursuant to  
18 a voluntary consent search is admissible regardless of any prior illegal conduct by law  
19 enforcement. Defendant responds that *Hall* was correctly decided and that, under *Hall*,  
20 the evidence seized pursuant to defendant's consent must be suppressed because the  
21 evidence was derived from the illegal stop.

22 We begin with a summary of the relevant parts of *Hall*. In that case, as

1 here, the defendant consented to a search voluntarily after being stopped by police, and  
2 the police discovered drugs. The defendant moved to suppress, arguing that the stop had  
3 been illegal and that that illegality required suppression of the evidence despite his  
4 voluntary consent to the search. The trial court denied the motion, but the Court of  
5 Appeals reversed and ordered the evidence suppressed. 339 Or at 10-12. The state  
6 petitioned for review, arguing, among other things, that the defendant's voluntary consent  
7 had severed the causal link between the illegal police conduct and the evidence. Thus, in  
8 the state's view, the exclusionary rule did not bar the evidence, because the illegal  
9 conduct did not bring the evidence to light. *Id.* at 14. On review, the majority of this  
10 court first determined that the stop was illegal under Article I, section 9. *Id.* at 19. As  
11 discussed below, the majority then addressed the proper framework for determining  
12 whether the evidence gleaned from the consent search nevertheless must be suppressed  
13 because of the illegal stop.

14           The majority in *Hall* began by outlining the history of the exclusionary rule  
15 in Oregon and analyzing this court's past treatment of consent searches. The  
16 exclusionary rule is constitutionally mandated and serves to vindicate a defendant's  
17 personal right to be free from unreasonable searches and seizures. *Id.* at 24. The federal  
18 exclusionary rule, by contrast, is premised on deterring police misconduct. *Id.* at 23. The  
19 goal of the exclusionary rule in Oregon is to "restore a defendant to the same position as  
20 if 'the government's officers had stayed within the law'" by suppressing evidence obtained  
21 in violation of the defendant's rights. *Id.* at 24 (quoting *State v. Davis*, 295 Or 227, 234,  
22 666 P2d 802 (1983)).

1           The majority noted that illegal police conduct may negate a defendant's  
2 consent to search and require suppression of evidence in two ways. First, the consent  
3 itself may be "involuntary" if the illegal police conduct overcame the defendant's free  
4 will, and the consent instead resulted from "police coercion." *Id.* at 20. Second, evidence  
5 gained through a voluntary consent search still may require suppression if the defendant's  
6 consent to search "derived from" the prior illegal police conduct. *Id.* at 21. The majority  
7 rejected the state's argument that only the voluntariness inquiry was necessary, stating  
8 that, even when a defendant voluntarily consents,

9           "this court's case law \* \* \* makes clear that Article I, section 9, also  
10           requires the consideration of the effect of the unlawful police conduct upon  
11           the defendant's decision to consent, even if that conduct did not rise to the  
12           level of overcoming the defendant's free will."

13 *Id.* at 32. In particular, the majority relied on *State v. Kennedy*, 290 Or 493, 624 P2d 99  
14 (1981), and *State v. Rodriguez*, 317 Or 27, 854 P2d 399 (1993), noting that those cases  
15 borrowed from the exploitation analysis that the United States Supreme Court announced  
16 in *Wong Sun v. United States*, 371 US 471, 83 S Ct 407, 9 L Ed 2d 441 (1963), to analyze  
17 whether Article I, section 9, required suppression of evidence obtained through valid  
18 consent searches.<sup>2</sup> Although neither *Kennedy* nor *Rodriguez* required suppression on the

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<sup>2</sup>           The majority also discussed and disavowed parts of *State v. Quinn*, 290 Or 383, 623 P2d 630 (1981), which had relied extensively on *Wong Sun*. The *Hall* court's rejection of the result in *Quinn* was based on the difference between the state and federal exclusionary rules and *Quinn*'s questionable application of *Wong Sun*, but *Hall* did not reject *Quinn*'s use of the *Wong Sun* exploitation analysis. *Hall*, 339 Or at 26-30.

1 facts of those cases, the majority in *Hall* noted that both cases analyzed the issue as  
2 whether the defendant's voluntary consent "derived from" the prior illegal seizures. 339  
3 Or at 30-32. The majority determined that "consent is insufficient to establish the  
4 admissibility of evidence from a warrantless search if the state cannot prove that the  
5 consent was independent of, or only tenuously related to, any preceding violation of the  
6 defendant's rights under Article I, section 9." *Id.* at 27 (citing *Rodriguez*, 317 Or at 41-  
7 42).

8 The majority in *Hall* summarized its conclusions as follows:

9 "After a defendant shows a minimal factual nexus between unlawful police  
10 conduct and the defendant's consent, then the state has the burden to prove  
11 that the defendant's consent was independent of, or only tenuously related  
12 to, the unlawful police conduct. Deciding whether the state has satisfied  
13 that burden requires a fact-specific inquiry into the totality of the  
14 circumstances to determine the nature of the causal connection between the  
15 unlawful police conduct and the defendant's consent. A causal connection  
16 requiring suppression may exist because the police sought the defendant's  
17 consent solely as the result of knowledge of inculpatory evidence obtained  
18 from unlawful police conduct. A causal connection requiring suppression  
19 also may exist because the unlawful police conduct, even if not overcoming  
20 the defendant's free will, significantly affected the defendant's decision to  
21 consent. Although determining the existence of such a causal connection  
22 requires examination of the specific facts at issue in a particular case, we  
23 view several considerations to be relevant to that determination, including  
24 (1) the temporal proximity between the unlawful police conduct and the  
25 defendant's consent, (2) the existence of any intervening circumstances, and  
26 (3) the presence of any circumstances -- such as, for example, a police  
27 officer informing the defendant of the right to refuse consent -- that  
28 mitigated the effect of the unlawful police conduct."

29 *Id.* at 34-35.

30 Justice Durham filed a separate opinion, joined by Justice Gillette,  
31 concurring in part and dissenting in part. The dissent agreed that the defendant had been

1 illegally stopped, but disagreed that that prior illegality should result in the suppression of  
2 the evidence gained through the consent search. The dissent asserted that the defendant's  
3 "voluntary consent to the search demonstrates that the disputed evidence came to light as  
4 the result of a reasonable, not unreasonable, search." *Id.* at 39 (Durham, J., concurring in  
5 part and dissenting in part). The dissent took issue with the majority's reliance on  
6 *Rodriguez*, 317 Or 27, which the dissent characterized as incorrectly focusing on the  
7 police decision to seek consent, "rather than the voluntariness of the defendant's consent."  
8 *Id.* at 50. In the dissent's view, the inquiry into the voluntariness of a defendant's consent  
9 takes into account any prior illegal conduct by the police. *Id.* at 46. And, a voluntary  
10 consent to search fully vindicates the defendant's rights under Article I, section 9, because  
11 the evidence was gained as a result of that consent and not by way of the prior illegality.  
12 *Id.* at 51.

#### 13 CLARIFICATION OF *HALL*

14 The state argues that we should overrule our 2005 decision in *Hall*, 339 Or  
15 7. "[T]he principle of *stare decisis* means that the party seeking to change a precedent  
16 must assume responsibility for affirmatively persuading us that we should abandon that  
17 precedent." [State v. Ciancanelli](#), 339 Or 282, 290, 121 P3d 613 (2005). The state thus  
18 has the burden of demonstrating that we should reconsider and reject the rule announced  
19 in *Hall*. The state argues, among other things, that *Hall* failed to apply this court's "usual  
20 paradigm" for analyzing constitution provisions; that the decision erroneously construed  
21 the text of Article I, section 9; and that it departed from earlier case law. We have  
22 considered -- and we reject -- the state's argument that *Hall* suffers from all of the

1 deficiencies that the state asserts. We also note that, in seeking to overrule *Hall*, the state  
2 relies in substantial part on arguments that were, in fact, raised by the *Hall* dissent and  
3 considered and rejected by the majority.

4           Although we reject the state's assertion that *Hall* articulated an  
5 impermissible construction of Article I, section 9, we agree that *Hall's* test for  
6 exploitation is flawed in some respects and bears refinement. The state argues that  
7 internal contradictions mar both steps of *Hall's* exploitation test and make the test  
8 difficult in application and uncertain in result. The state is correct that, in practice, the  
9 *Hall* test has caused some confusion. Parties and the courts have struggled to determine  
10 when a defendant has met his or her burden of establishing a "minimal factual nexus" and  
11 whether the police exploited their illegal conduct to obtain a defendant's consent to  
12 search. We turn to those issues.

13           We begin with a review of the relevant legal principles. In the context of  
14 *Hall* and in this case, the inquiry into whether evidence obtained pursuant to a consent  
15 search must be suppressed involves three overlapping issues: (1) whether the initial stop  
16 was lawful; (2) whether the defendant's consent to the search was voluntary; and (3)  
17 assuming that the stop was unlawful and the consent voluntary, whether the police  
18 exploited the illegal stop to obtain the disputed evidence.

19           The first issue is the lawfulness of the police-citizen encounter. There is  
20 nothing constitutionally suspect under Article I, section 9, about police engaging a citizen  
21 in conversation and then requesting that citizen's consent to search. *Ashbaugh*, 349 Or at  
22 308-09. In contrast to "mere conversation," which does not implicate Article I, section 9,

1 an officer "stops" an individual -- raising potential constitutional issues -- when the  
2 officer "intentionally and significantly restricts, interferes with, or otherwise deprives an  
3 individual of that individual's liberty or freedom of movement." *Id.* at 308-09, 316.  
4 Before stopping an individual, Article I, section 9, requires the police to have reasonable  
5 suspicion that the individual is involved in criminal activity. In the absence of reasonable  
6 suspicion (or some other permissible concern, such as officer safety), the individual has  
7 the right to be free from police interference and may terminate an encounter with police  
8 at will. *See id.* at 308-09.

9           The second issue is whether the consent to search was voluntary. The  
10 proper test for voluntariness of consent "is to examine the totality of the facts and  
11 circumstances to see whether the consent was given by defendant's free will or was the  
12 result of coercion, express or implied." *Kennedy*, 290 Or at 502 (citing *Schneckloth v.*  
13 *Bustamonte*, 412 US 218, 226-27, 93 S Ct 2041, 36 L Ed 2d 854 (1973)). To prove the  
14 voluntariness of a consent to search in the context of an illegal stop, the state must prove  
15 that the defendant's consent was the product of his own free will, rather than the result of  
16 coercion. *State v. Wolfe*, 295 Or 567, 572, 669 P2d 320 (1983); *see also State v. Stevens*,  
17 311 Or 119, 136, 806 P2d 92 (1991) (consent to search voluntary when no evidence that  
18 "the police intimidated or coerced defendant in any way"); *Kennedy*, 290 Or at 504, 506  
19 (consent to search voluntary in light of "an almost total absence of coercive factors").

20           The specific focus of *Hall* and of this case is the third part of the inquiry: If  
21 the police-citizen encounter was unlawful, but the consent to search was voluntary, the  
22 issue becomes whether the police exploited their illegal conduct to obtain the consent to

1 search and, by that means, the evidence in question. In *Wong Sun*, the United States  
2 Supreme Court described exploitation as "whether, granting establishment of the primary  
3 illegality, the evidence to which instant objection is made has been come at by  
4 exploitation of that illegality or instead by means sufficiently distinguishable to be purged  
5 of the primary taint." 371 US at 488 (internal quotation marks and citation omitted).  
6 Since at least *Kennedy*, this court has referred to and used the exploitation analysis  
7 announced in *Wong Sun* in the context of determining whether evidence obtained through  
8 voluntary consent searches should be suppressed. *See Kennedy*, 290 Or at 501  
9 ("[E]vidence [gained from a consent search during or after alleged police illegality] is to  
10 be suppressed only if it is found that the consent was gained by exploitation of the  
11 illegality or that defendant's free will was tainted by the illegal police conduct." (Citing  
12 other state and federal jurisdictions that apply *Wong Sun* to consent searches.)). The  
13 United States Supreme Court also has employed exploitation analysis in the context of  
14 consent searches, even when the consent was "voluntary," in the sense that it was not  
15 coerced. *See, e.g., Florida v. Royer*, 460 US 491, 103 S Ct 1319, 75 L Ed 2d 229 (1983)  
16 (voluntary consent to search tainted by illegal detention by police).

17           The relationship between the voluntariness of consent and exploitation, of  
18 course, is a close one: often, when the circumstances support the determination that  
19 consent was voluntary, they also will support the conclusion that there was no  
20 exploitation of any prior police misconduct, and the converse is also true. Yet it is  
21 important to emphasize that the tests are not identical and that they address separate  
22 concerns. As Professor LaFave notes,

1 "While there is a sufficient overlap of the voluntariness and [exploitation]  
2 tests that often a proper result may be reached by using either one  
3 independently, it is extremely important to understand that (i) the two tests  
4 are not identical, and (ii) consequently the evidence obtained by the  
5 purported consent should be held admissible only if it is determined that the  
6 consent was *both* voluntary and not an exploitation of the prior illegality."

7 Wayne R. LaFave, 4 *Search and Seizure* § 8.2(d), 76 (4th ed 2004) (emphasis in original;  
8 footnote omitted). We agree. Applying both the tests for voluntariness of consent and  
9 for exploitation is necessary to vindicate a defendant's right to be free from unreasonable  
10 search and seizure. When the police stop an individual without reasonable suspicion, the  
11 individual's liberty is restrained in violation of Article I, section 9. Because the person  
12 stopped is unable to terminate the interaction with police, he or she is subject to police  
13 authority in excess of constitutional bounds and is thereby placed at a disadvantage  
14 relative to the constitutional position that he or she would have occupied absent the  
15 illegal police interference. Exploitation analysis recognizes that police conduct that  
16 constitutes an illegal stop may fall short of coercing a defendant to consent to a  
17 subsequent request to search, but nevertheless may require suppression because the police  
18 took advantage of information gained from their illegal conduct to obtain consent -- an  
19 advantage that they would not have had had the police stayed within the bounds of the  
20 law. *Hall*, 339 Or at 27-28. It is that exploitation of the prior police illegality that must  
21 be remedied (or vindicated). *See State v. Sargent*, 323 Or 455, 462-63, 918 P2d 819  
22 (1996) (suppression of evidence required only when the evidence is tainted by the  
23 constitutional violation); *State v. Williamson*, 307 Or 621, 626, 772 P2d 404 (1989)  
24 (search not valid when consent is "obtained under the pressure of police action that

1 became available to police only by the prior unauthorized conduct").

2           With that background in mind, we turn to the exploitation test articulated in  
3 *Hall*. As noted, *Hall* announced a two-part test for determining whether evidence  
4 acquired from a voluntary consent search must be suppressed because the consent was  
5 derived from an illegal seizure. First, the defendant must establish a "minimal factual  
6 nexus -- that is, at minimum, the existence of a 'but for' relationship -- between the  
7 evidence sought to be suppressed and prior unlawful police conduct." 339 Or at 25.  
8 Once the defendant establishes that causal link, the burden shifts to the state to prove that  
9 the evidence nevertheless is admissible because "the defendant's consent was independent  
10 of, or only tenuously related to, the unlawful police conduct." *Id.* at 34-35.

11           For the reasons that follow, we disavow the "minimal factual nexus" part of  
12 the *Hall* test and instead hold that, when a defendant has established that an illegal stop  
13 occurred and challenges the validity of his or her subsequent consent to a search, the state  
14 bears the burden of demonstrating that (1) the consent was voluntary; and (2) the consent,  
15 even if voluntary, was not the product of police exploitation of the illegal stop. In  
16 deciding whether the voluntary consent was a product of police exploitation of the illegal  
17 stop, the court must evaluate whether the police took advantage of the illegal aspects of  
18 the earlier police behavior to obtain consent or whether other circumstances were  
19 sufficient to purge the taint of the prior illegality on the evidence that the police  
20 ultimately obtained. As noted in *Hall*, 339 Or at 44, the state also may prove that the  
21 evidence is admissible by showing that the evidence was gained through an independent,  
22 lawful source or that the evidence inevitably would have been discovered by the police

1 using lawful procedures.

2 As discussed further below, we disavow the "minimal factual nexus" part of  
3 the *Hall* test because it was drawn from a case that arose in a significantly different  
4 procedural context, and it did not take into account a relevant statute. Moreover, since  
5 this court issued *Hall*, the test has been unevenly applied and, apparently, has proved  
6 confusing to lawyers and judges.

7 *Hall* adopted the "minimal factual nexus" component of its test from [State](#)  
8 [v. Johnson](#), 335 Or 511, 73 P3d 282 (2003). In that case, the defendant sought to  
9 suppress evidence that had been seized illegally but then later "re seized" pursuant to a  
10 warrant. The state asserted that the warrant was "entirely independent of, and was not  
11 obtained by exploitation of, the previous illegality." *Id.* at 519. Ordinarily, a search  
12 performed under authority of a warrant is subject to a presumption of regularity, and the  
13 party challenging the evidence bears the burden to prove the unlawfulness of the search  
14 or seizure. *Id.* at 520-21. Before addressing the state's exploitation argument, the court  
15 addressed which party bore the burden with regard to proving exploitation or its absence.  
16 Because of the presumption of regularity when the police act under authority of a  
17 warrant, the court concluded that the defendant had an initial burden to establish a  
18 "factual nexus" between prior illegal police conduct and the evidence gained pursuant to  
19 an independently valid warrant. *Id.* at 521. Once a defendant demonstrates that nexus,  
20 the court in *Johnson* wrote, "the presumption of regularity [of the warrant] is undermined  
21 and the burden of proof fairly may be shifted to the government to show that the evidence  
22 is not tainted by the misconduct." *Id.*

1           This court's reliance in *Hall* on *Johnson* was misplaced. By statute,  
2 whenever a defendant challenges evidence seized following a warrantless search, the  
3 state bears the burden of proving "by a preponderance of the evidence the validity of the  
4 search." ORS 133.693(4); [State v. Tucker](#), 330 Or 85, 87, 997 P2d 182 (2000). When the  
5 police conduct a search and seize evidence without a warrant, as in *Hall* and in this case,  
6 there is no presumption of regularity to overcome, because there was no warrant and,  
7 thus, there is no need for a threshold showing by the defendant to shift the burden to the  
8 state. The state already has the burden to prove that the warrantless search was valid.

9           Moreover, under the *Hall* test, parties were required to first focus on  
10 whether or not a "minimal factual nexus" was present, rather than examining the more  
11 central issues of (1) whether the police had acted unlawfully in making the initial stop,  
12 and (2) whether the later consent to search and subsequently discovered evidence were  
13 obtained through exploitation of the unlawful police conduct. However, exploitation  
14 analysis already considers the existence of a "minimal factual nexus," because  
15 determining whether the police exploited their unlawful conduct to gain the disputed  
16 evidence necessarily requires an examination of the causal connection between the police  
17 conduct and the defendant's consent. Accordingly, the "minimal factual nexus" test is not  
18 analytically significant in determining whether the consent was the product of the illegal  
19 police conduct, such that evidence obtained pursuant to that search must be suppressed.  
20 Additionally, it is unnecessary to shift the burden of proving lack of exploitation to the  
21 state because, as noted, the state already bears the burden of proving that evidence  
22 obtained from a warrantless search is valid.

1           Because the "minimal factual nexus" test adopted in *Hall* does not have  
2 firm grounding in our case law and is inconsistent with ORS 133.693(4) -- and because  
3 the application of the test has been unclear in our cases since *Hall* and has proved  
4 confusing to litigants and the courts -- we disavow that part of the *Hall* analysis.

5           We now turn to the remaining -- and more central -- part of the *Hall*  
6 exploitation test. That test requires the state to prove "that the defendant's consent was  
7 independent of, or only tenuously related to, the unlawful police conduct." 339 Or at 35.  
8 *Hall* posited two scenarios that require suppression:

9           "A causal connection requiring suppression may exist because the police  
10 sought the defendant's consent solely as the result of knowledge of  
11 inculpatory evidence obtained from unlawful police conduct. A causal  
12 connection requiring suppression also may exist because the unlawful  
13 police conduct, even if not overcoming the defendant's free will,  
14 significantly affected the defendant's decision to consent."

15 *Id.* *Hall* identified three factors for assessing whether the causal connection  
16 "significantly affected" the defendant's decision to consent and thus requires suppression:

17           "(1) the temporal proximity between the unlawful police conduct and the  
18 defendant's consent, (2) the existence of any intervening circumstances, and  
19 (3) the presence of any circumstances -- such as, for example, a police  
20 officer informing the defendant of the right to refuse consent -- that  
21 mitigated the effect of the unlawful police conduct."

22 *Id.*

23           The state asserts that the *Hall* test does not afford sufficient weight to a  
24 defendant's decision to voluntarily relinquish his or her Article I, section 9, right to be  
25 free from unreasonable governmental searches and seizures because, under *Hall*,  
26 suppression almost always will be required when consent is granted in close temporal

1 proximity to an illegal stop. In *Hall* itself, the court required suppression, "[g]iven the  
2 close temporal proximity between the illegal detention and defendant's consent, and the  
3 absence of any intervening circumstances or other circumstances mitigating the effect of  
4 that unlawful police conduct." *Id.* at 36. This court's cases following *Hall* have reached  
5 similar results. See, e.g., [State v. Rodgers/Kirkeby](#), 347 Or 610, 630, 227 P3d 695 (2010)  
6 (evidence suppressed under *Hall* when consent granted in close temporal proximity to  
7 illegal stop and state failed to demonstrate intervening or mitigating circumstances);  
8 [State v. Ayles](#), 348 Or 622, 637-39, 237 P3d 805 (2010) (same).

9           We agree that the exploitation test announced in *Hall* does not account  
10 sufficiently for the importance of a defendant's voluntary consent to search. Our cases  
11 demonstrate that, in some situations, a defendant's voluntary consent itself may be  
12 sufficient to demonstrate that the search was reasonable and permitted, notwithstanding  
13 the prior illegality. See *Rodriguez*, 317 Or at 41-42; *Williamson*, 307 Or at 626 (both  
14 rejecting proposition that consent "can never legitimize" a search following illegal police  
15 conduct). That legal determination -- whether consent has so attenuated the connection  
16 between the prior illegal conduct and the evidence obtained in the consent search --  
17 requires a court to consider the illegal conduct that comprised the stop, the character of  
18 the consent, and the causal relationship between the two. In *Kennedy*, for example, the  
19 defendant's consent was not "tainted" by the illegal police conduct when there was an  
20 "absence of any coercive circumstances surrounding [the] defendant's consent" and the  
21 defendant volunteered consent without prompting from the officers. 290 Or at 506.

22           The court in *Hall* asserted that the unprompted grant of consent in *Kennedy*

1 and a similar volunteering of consent in *Rodriguez* were intervening circumstances that  
2 cut off the causal connection between the consent and the prior illegal conduct. *Hall*, 339  
3 Or at 34. *Hall*, however, suggested that, had the police asked for (and obtained) the  
4 defendant's consent in *Rodriguez* -- rather than the defendant having volunteered to be  
5 searched -- suppression would have been required. *Id.* By asserting that an *unprompted*  
6 consent is an intervening circumstance sufficient to mitigate the taint of the prior  
7 illegality but positing that a *requested* consent on the same facts would not purge the  
8 taint, *Hall*, in effect, created a *per se* rule that evidence gained from a requested consent  
9 search always must be suppressed if that request occurs in close temporal proximity to  
10 the illegal stop and the state cannot demonstrate some breach in the causal chain.

11           The fact that a consent to search was unprompted or unilateral is relevant  
12 evidence of the voluntariness of the consent; as recognized in *Kennedy* and *Rodriguez*,  
13 unprompted or unilateral consent is less likely to be a product of illegal police conduct.  
14 However, the fact that an officer requested consent does not demonstrate that the officer  
15 necessarily *exploited* the prior illegal conduct to gain consent. *Rodriguez*, for example,  
16 involved a voluntary consent following an illegal arrest. The officer did not directly ask  
17 the defendant for consent to search, but he did ask the defendant if he had any drugs or  
18 guns in his apartment. *Rodriguez*, 317 Or at 41. In response to that question, the  
19 defendant said, "No, go ahead and look." *Id.* So, even if the defendant's consent in  
20 *Rodriguez* was "volunteered," that consent was, in fact, prompted by the officer's  
21 question about drugs and guns. *Rodriguez* concluded, nevertheless, that the officer "did  
22 not trade on or otherwise take advantage of the arrest to obtain defendant's consent" in

1 light of the factual circumstances, including the manner in which the defendant had  
2 granted consent. *Id.*

3 Properly considered, then, a voluntary consent to search that is prompted by  
4 an officer's request can be sufficient to purge the taint of illegal police conduct. Whether  
5 the voluntary consent is sufficient to purge the taint -- or whether the police exploited  
6 their illegal conduct to obtain consent -- will depend on the totality of the circumstances.  
7 We reject the state's position that voluntary consent during an unlawful stop necessarily  
8 breaks the causal chain and makes the evidence admissible, as we do defendant's  
9 argument that such consent will rarely, if ever, break the causal chain.

10 In an effort to clarify this complicated area of law, we again review the  
11 basic principles at issue. As noted, the overarching inquiry is whether the evidence that  
12 the state seeks to introduce must be suppressed because that evidence was obtained in  
13 violation of the defendant's constitutional rights. In the context of *Hall* and this case,  
14 where an illegal stop preceded a consent to search, that inquiry has two prongs. First, the  
15 court must assess whether the consent was voluntary. If the consent to search was not  
16 voluntary, then the evidence must be suppressed, because only a voluntary consent to  
17 search provides an exception in this context to the warrant requirement of Article I,  
18 section 9. Second, even if the consent was voluntary, the court must address whether the  
19 police exploited their prior illegal conduct to obtain the evidence. Evidence may be  
20 tainted directly by the illegal police conduct, if, for example, the police illegally stop a  
21 vehicle, allowing them to view contraband that otherwise would not have been visible,  
22 and then request the driver's consent to search the vehicle as a result of what they saw.

1 The consent in that example does not "purge the taint" of the prior illegal stop, because  
2 the evidence has a direct causal connection to the illegal conduct.

3 Evidence also may be tainted if the police obtained the consent to search  
4 through less direct exploitation of their illegal conduct. As noted, *Hall* identified several  
5 factors for analyzing whether the police exploited their illegal conduct to obtain consent.  
6 Those factors include the temporal proximity between the illegal police conduct and the  
7 consent and the presence of any intervening or mitigating circumstances, such as  
8 *Miranda* warnings or other admonitions. *Hall*, 339 Or at 35, 35 n 21. Additionally, the  
9 purpose and egregiousness of the illegal police conduct is relevant to whether the police  
10 exploited that conduct to obtain the defendant's consent to search. *See Brown v. Illinois*,  
11 422 US 590, 603-04, 95 S Ct 2254, 45 L Ed 2d 416 (1975) (identifying "the purpose and  
12 flagrancy of the official misconduct" as relevant to exploitation analysis under the Fourth  
13 Amendment); *see also Wolfe*, 295 Or at 572 (explaining that the *Brown* exploitation  
14 factors, including "the purpose and flagrancy of the official misconduct," were relevant to  
15 determine the effect of police misconduct on the voluntariness of a defendant's consent to  
16 search). *Hall* asserted, without discussion, that "the *Brown* factor of 'purpose and  
17 flagrancy of the official misconduct' relates to only the deterrence rationale of the Fourth  
18 Amendment exclusionary rule and has no applicability to the exclusionary rule under  
19 Article I, section 9." 339 Or at 35 n 21. Although *Hall* was correct that the Oregon  
20 exclusionary rule, unlike the federal one, does not balance the value of deterrence against  
21 the costs of exclusion in determining whether evidence should be suppressed, *id.* at 23-  
22 24, we clarify here that the "purpose and flagrancy" of police misconduct nonetheless

1 may play a role in exploitation analysis. For example, police misconduct that is intended  
2 to gain a defendant's consent may well be more likely to substantially affect that  
3 defendant's decision to consent. Likewise, particularly egregious police misconduct --  
4 such as excessive use of force in unlawfully seizing a defendant -- is more likely to affect  
5 the defendant's decision to consent than more restrained police behavior. The verbal and  
6 nonverbal interactions between a defendant and the police leading up to the consent itself  
7 are relevant to whether or not the police gained consent through exploitation.

8           Stated in terms of the state's burden, the state must prove that the  
9 defendant's consent was sufficient to attenuate the taint of the illegal police conduct. We  
10 emphasize that the state is not required to prove that there was no causal link whatsoever  
11 between the illegal conduct and consent; rather, the state must prove that the illegal  
12 police conduct was a minor or remote cause. *See Rodriguez*, 317 Or at 40 ("Mere  
13 physical presence as a result of prior unlawful conduct does not constitute exploitation of  
14 that conduct. Exploitation occurs when the police take advantage of the circumstances of  
15 their unlawful conduct to obtain the consent to search."). As this court often has stated,  
16 but-for causation -- that, as a factual matter, the illegal police conduct was a necessary  
17 link in the sequence of events that led to the consent search and the evidence -- is  
18 insufficient to require suppression. *Kennedy*, 290 Or at 500-01. If the defendant shows  
19 that he or she was stopped illegally and challenges the validity of his or her consent to  
20 search, then the state is required to prove that the police did not exploit their illegal  
21 conduct to obtain consent. If the state fails to make that showing, the evidence will be  
22 suppressed. However, if the state can show that the illegal conduct did not "significantly

1 affect[]" the consent that the police obtained, then the state has established that the police  
2 did not exploit that conduct, and suppression is not required. *Hall*, 339 Or at 35.

3           In analyzing exploitation, it must be remembered that Article I, section 9,  
4 prohibits "unreasonable" searches and seizures. As the preceding discussion  
5 demonstrates, the test for whether a consent search conducted following an illegal stop  
6 comports with Article I, section 9, cannot be reduced to a simple formula. On the  
7 contrary, like all reasonableness determinations, whether a particular search or seizure is  
8 unreasonable necessarily depends on the facts of each case.

9           We again emphasize that, in addition to analyzing possible exploitation of  
10 prior police misconduct -- the issue in this case -- the trial court must consider whether  
11 the defendant's consent was voluntary. If the defendant's consent was not voluntary, the  
12 evidence obtained as a result of that search must be suppressed, regardless of whether any  
13 exploitation occurred. *See, e.g., State v. Guggenmos*, 350 Or 243, 261-62, 262 n 8, 253  
14 P3d 1042 (2011) (finding no reason to determine whether exploitation analysis would  
15 require suppression of evidence because determination that consent was not voluntary  
16 required suppression); *Williamson*, 307 Or at 626-27 (Carson, J., concurring) ("The  
17 validity of [the defendant's] consent determines the outcome of this case. If the consent  
18 were involuntary and, thus, invalid, the subsequent search and resulting seizure, arrest,  
19 and conviction likewise were invalid."). Because the tests for exploitation and  
20 voluntariness, while overlapping, are not identical, it is important that the trial court  
21 consider both tests in deciding whether to suppress evidence obtained in a consent search  
22 that follows an illegal stop.

1           We turn to several issues that the dissent raises. The dissent argues, among  
2 other things, that we have overruled *Hall* and other cases *sub silentio*; abandoned an  
3 "objective" and "logical" test for one that is "more intrusive and less clear"; and failed to  
4 "grapple sufficiently with whether defendant's consent was \* \* \* a product of the officer's  
5 unlawful stop and detention." \_\_\_ Or at \_\_\_ (Walters, J., dissenting) (slip op at 4-6).  
6 The dissent is wrong on each count. In this case, we clarify the rule announced in *Hall*.  
7 The state asked us to overrule *Hall*, arguing that, if a defendant who is unlawfully  
8 stopped by police voluntarily consents to a search, then that consent always makes the  
9 search reasonable and the evidence seized in the search admissible. We expressly reject  
10 that argument. Instead, we adhere to *Hall* in holding that evidence obtained from a  
11 consent search must be suppressed if the consent was obtained through exploitation of the  
12 unlawful police conduct. Under *Hall* -- and under our decision today -- the state must  
13 prove that "the defendant's consent was independent of, or only tenuously related to, the  
14 unlawful police conduct." *Hall*, 339 Or at 35. That analysis is consistent with our  
15 reliance in *Hall* on long-standing exploitation analysis derived from the United States  
16 Supreme Court's decision in *Wong Sun* and this court's cases following *Wong Sun*,  
17 including *Kennedy* and *Rodriguez*. In this case, as discussed above, \_\_\_ Or at \_\_\_ (slip  
18 op at 16-21), we modify the exploitation test announced in *Hall*, because we conclude  
19 that it did not give sufficient weight to a defendant's voluntary consent to a search, as  
20 well as to other factors such as the purpose and egregiousness of the police misconduct.<sup>3</sup>

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<sup>3</sup> The dissent argues that we have "reverse[d]" and "effectively overrul[ed]"

1           We also disagree that *Hall* established a logical, easily applied test that we  
2 have now abandoned for one that is more intrusive and less clear. *Hall*, as noted,  
3 followed the exploitation analysis of *Wong Sun* and required consideration of "the effect  
4 of the unlawful police conduct upon the defendant's decision to consent." 339 Or at 32.  
5 That determination "requires examination of the specific facts at issue in a particular  
6 case," including "temporal proximity" between the unlawful police conduct and the  
7 defendant's consent, "intervening circumstances," and other circumstances that "mitigated  
8 the effect of the unlawful police conduct." *Id.* at 35. In this case, we point out that the  
9 focus on "temporal proximity" too easily leads to the conclusion that any consent search  
10 that occurs when a person is unlawfully stopped is invalid, when the better-framed  
11 question is whether police *exploited* the unlawful stop to obtain the consent. It is true that  
12 that test requires consideration of the totality of the circumstances of the stop and the  
13 police-citizen encounter, but that is often the case in deciding search and seizure cases.

14           Finally, the dissent's claim that we fail to "grapple sufficiently" with the  
15 question whether the consent given in this case was the "product" of the unlawful stop  
16 seems to contradict its argument in favor of a simpler test. As our application below of

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*Hall* and *Rodgers/Kirkeby*, suggesting that the results in those cases would have been different under the test that we adopt here. Whether the outcome in *Hall* and *Rodgers/Kirkeby* would have been different under the analysis set out here is speculative. The issue whether a defendant's consent was the "product" of unlawful police conduct or, put differently, whether police "exploited" their unlawful conduct to obtain consent, is necessarily dependent on the facts of the particular case and on the record developed in the trial court.

1 the test that we have articulated to the facts of this case demonstrates, the test is more  
2 nuanced than that announced in *Hall* and takes into account the totality of the  
3 circumstances of the encounter. As we describe below, that test provides a more careful  
4 and more full consideration of the facts that lead to a determination as to whether the  
5 consent was the "product" of the unlawful police conduct than did the test in *Hall*.

#### 6 APPLICATION

7 We return to the issue in this case. The Court of Appeals concluded that  
8 defendant had been stopped "when the movement of his truck was physically constrained,  
9 he was directed to move to a location to speak with a deputy, his identification was  
10 obtained, and he was questioned by the deputy." *Hemenway*, 232 Or App at 411. The  
11 court also determined that the stop was unlawful because the police had lacked  
12 reasonable suspicion that defendant was engaged in criminal conduct. *Id.* The state does  
13 not challenge the Court of Appeals' determination that defendant was illegally stopped,  
14 and we therefore do not consider that issue further.

15 After being stopped, defendant then consented to three searches. Defendant  
16 agrees that his consent to search was "voluntary" in the sense used in our cases -- that is,  
17 that the consent was not coerced. The only question, then, is whether defendant's consent  
18 was gained through exploitation of the illegal stop. The Court of Appeals concluded that  
19 it was, stating that, because defendant's consent had occurred "contemporaneously with  
20 the stop, with no intervening or mitigating factors[,] [i]t was therefore dependent on the  
21 unlawful stop and was not attenuated" under *Hall*. *Id.* at 416.

22 Because exploitation is a fact-intensive inquiry, we review the facts in some

1 detail. Defendant's girlfriend, Taylor, called 9-1-1 regarding the whereabouts of her son,  
2 who was overdue from a visit to a friend's house, and an unspecified problem with  
3 electrical power at the house. Close to midnight and several hours after Taylor had  
4 placed the call, two officers arrived at Taylor's residence in separate vehicles. Defendant  
5 was in the process of moving out, and his truck, filled with his belongings, was parked in  
6 the driveway. The officers parked in the driveway, behind defendant's truck. Both  
7 Taylor and defendant were outside the residence when the officers arrived. Deputy  
8 Orella observed a rifle in defendant's truck and told Deputy Russell. Orella approached  
9 Taylor and directed defendant to speak with Russell.

10 Defendant stated that he was moving out and that he had a handgun and  
11 another firearm in the truck, in addition to the rifle. Russell asked if defendant was a  
12 felon and requested defendant's name and date of birth, which defendant provided.  
13 Russell and defendant engaged in what the trial court described as "chit-chat of an  
14 innocuous nature," and, according to Russell:

15 "[Defendant] asked if he could have a cigarette, and I said that's no  
16 problem. Asked him if he'd have a problem with me searching him just to  
17 put me at ease and then he could have his hands wherever he wanted and  
18 we wouldn't have to worry about, you know, knowing if there [were]  
19 weapons or anything else on him he shouldn't have."

20 The trial court found that Russell was "concerned because the [d]efendant had his hands  
21 in his pockets which were bulky, had weapons in the vehicle and it was very dark at their  
22 location." Defendant consented to that search. Russell found a small tin in defendant's  
23 pocket and asked if he could open it. Defendant again consented, and the deputy found  
24 drug paraphernalia and residue. The officer arrested defendant and gave him *Miranda*

1 warnings. Defendant then consented to a search of the residence. The trial court found  
2 that the tone of the interactions between defendant and Russell had been "normal" prior  
3 to the arrest and that defendant had been "cooperative and forthcoming."

4 In this court, as noted, the state does not challenge the Court of Appeals'  
5 determination that, at the time of defendant's consents to the searches, he had just been  
6 unlawfully stopped. Accordingly, the temporal proximity factor weighs in defendant's  
7 favor. *See Ayles*, 348 Or at 637.

8 On the other hand, there is no evidence that the police conduct in this case  
9 was egregious; indeed, the trial court described the interaction between Russell and  
10 defendant as "amicable and casual," and the record amply supports that conclusion.  
11 Regarding the purpose of the police actions, the stop occurred around midnight during a  
12 welfare check initiated by defendant's girlfriend, who was concerned about the  
13 whereabouts of her son. Although the officers parked their cars in the driveway behind  
14 defendant's truck, there was no indication that they did so for the purpose of blocking him  
15 from leaving. Moreover, the police had observed a rifle in defendant's truck when they  
16 first arrived, before any stop occurred. Defendant then had volunteered that he was  
17 moving his possessions out of the house and that he also had a handgun and another  
18 firearm in the truck. The officers' interactions with defendant, then, were -- at least  
19 initially -- for the lawful purpose of investigating Taylor's call to the police. There is no  
20 indication that, when the officers stopped defendant, they did so with the purpose of  
21 searching for evidence, in contrast to *Williamson*, 307 Or at 623, 623-24 n 1.

22 We turn to defendant's three consents to search. As to each consent, the

1 trial court found that there was no evidence of police coercion, either express or implied,  
2 and that each consent had been voluntary. On review, defendant does not dispute that  
3 conclusion. He argues, instead, that the police exploited their illegal stop to obtain his  
4 consent to the searches that led to the evidence upon which he was convicted and that,  
5 under *Hall*, the evidence therefore must be suppressed. The trial court found that the  
6 police made no verbal or physical threats and did not approach defendant with weapons  
7 drawn. The trial court described defendant as "cooperative" throughout the entire  
8 encounter.

9           As to defendant's first consent, the trial court found that, when Russell had  
10 asked to search defendant to "ease his mind," defendant "readily agreed." Defendant  
11 testified at the suppression hearing that he consented to the first search to show that "I  
12 wasn't any kind of a threat to him." The evidence supports the trial court's conclusion  
13 that defendant had consented to "ease [Russell's] mind." The cause of the consent, then,  
14 does not appear to be the illegal conduct by the police. Rather, the setting of the  
15 interaction -- the welfare check, the darkness, defendant's acknowledged possession of  
16 firearms in his truck, and defendant's desire to have a cigarette while the police conducted  
17 the welfare check -- and the testimony of defendant and the officers indicates that  
18 defendant's consent was not the product of the unlawful stop. Aside from the close  
19 temporal proximity to the stop, there is no evidence that Russell exploited any aspect of  
20 the stop to obtain defendant's first consent. Accordingly, we hold that defendant's first  
21 consent was not a product of the illegal stop.

22           During the first search, Russell discovered a small tin and requested

1 consent to open it. Defendant responded, according to Russell, in a "low mopey voice"  
2 that he could, and Russell discovered a methamphetamine pipe and methamphetamine  
3 residue. Russell did not threaten or cajole defendant regarding the tin; he simply  
4 requested consent to open it. There is no evidence that Russell took advantage of the fact  
5 that defendant was unable to terminate the encounter to gain defendant's consent to open  
6 the tin. Given that the first search, which led to the discovery of the tin, was valid and  
7 that there is no indication in the record that Russell exploited the stop to gain defendant's  
8 consent to open the tin, the evidence in the tin was not tainted by the prior illegal  
9 conduct. Because the drug evidence from the tin was not tainted by the unlawful stop,  
10 defendant's Article I, section 9, right to be free from unreasonable seizure would not be  
11 vindicated by suppressing that evidence.

12           After discovering the contraband, Russell arrested defendant and gave him  
13 *Miranda* warnings. Defendant acknowledged that there might be more drugs in the house  
14 and consented to a search of the house. Defendant then led Russell to more contraband.  
15 As noted, defendant's prior consents were valid, and, therefore, the evidence gained from  
16 those searches was not tainted by the illegal stop. Discovery of that drug evidence gave  
17 Russell probable cause to arrest defendant. Moreover, defendant had been given  
18 *Miranda* warnings before Russell requested consent to search the house. Accordingly,  
19 defendant's arrest was lawful, and defendant's voluntary consent to search the house  
20 following his arrest did not violate Article I, section 9, of the Oregon Constitution.

21           The decision of the Court of Appeals is reversed. The judgment of the  
22 circuit court is affirmed.

1           **LANDAU, J.**, concurring.

2           I agree with the majority's disposition and reasoning on the merits in this  
3 case. I write separately to address the state's argument that we should reexamine the  
4 search and seizure guarantee of Article I, section 9, in accordance with this court's "usual  
5 paradigm" for constitutional interpretation. The majority summarily rejects the state's  
6 argument. *State v. Hemenway*, \_\_\_ Or \_\_\_, \_\_\_, \_\_\_, \_\_\_ P3d \_\_\_ (Jan 10, 2013) (slip  
7 op at 8-9). I agree with the majority's ultimate conclusion, but I think that it is important  
8 to set out some of the reasons why that conclusion is correct.

9           The state's argument is predicated on [\*Stranahan v. Fred Meyer, Inc.\*](#), 331  
10 Or 38, 11 P3d 228 (2000), in which this court observed that "it long has been the practice  
11 of this court to ascertain and give effect to the intent of the framers" of a disputed  
12 provision of the state constitution. *Id.* at 54 (internal quotation marks omitted). The  
13 court invited litigants to present arguments that we should reconsider prior case law  
14 because of a "failure on the part of this court at the time of the earlier decision to follow  
15 its usual paradigm for considering and construing the meaning of the provision in  
16 question." *Id.* In light of what this court said in *Stranahan*, I do not fault the state for  
17 making the argument that it advances in this case. I do, however, take issue with  
18 *Stranahan* and its stated commitment to a jurisprudence of original intent.

19           At the outset, I question the accuracy of *Stranahan's* observation that such  
20 has been the longstanding practice of the court. If the court meant that there are some

1 very old cases in which the court applied that interpretive approach, I suppose the  
2 observation is true enough.<sup>4</sup> But I take *Stranahan* to assert that originalism<sup>5</sup> is a well-  
3 established methodology that this court has consistently applied for a long time. In that  
4 regard, *Stranahan* is incorrect. Sometimes the court has applied that interpretive  
5 approach, and sometimes it has not. *See, e.g., Dodd v. Hood River County*, 317 Or 172,  
6 180-82, 855 P2d 608 (1993) (state constitutional takings clause interpreted without  
7 reference to framers' intentions); *State v. Mai*, 294 Or 269, 272, 656 P2d 315 (1982)  
8 (state constitutional compulsory process clause is construed "in the same way as the  
9 [United States] Supreme Court construed the virtually identical federal counterpart" and  
10 without reference to the intention of its Oregon framers).

11 That said, there certainly are a number of cases in which the court  
12 determined the meaning of the state constitution by reference to the "framers' intentions."  
13 In fact, in more than a few cases, the court has effectively limited the scope and meaning

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<sup>4</sup> The court in *Stranahan* cited *Jones v. Hoss*, 132 Or 175, 178, 285 P 205 (1930). There are actually older cases, such as *Noland v. Costello*, 2 Or 57, 58-59 (1863), that refer to the intentions of the framers of the state constitution.

<sup>5</sup> I use the term somewhat loosely to refer to the mode of constitutional interpretation that regards the meaning of a provision as frozen in time in accordance with the intentions of those who adopted the constitution or with the meaning of the constitution as it would have been understood at that time. I understand that, among scholars, there is a difference between original intent and original public meaning, *see, e.g.,* Keith E. Whittington, *The New Originalism*, 2 *Geo J L & Pub Pol'y* 599 (2004) (describing transition among originalist scholars from emphasizing original intent to original public meaning), but that is a distinction that this court's prior cases have not consistently recognized.

1 of a provision of the state constitution to whatever its framers would have understood it  
2 to mean in 1857. At the very least, there is language in a number of those opinions that  
3 has understandably led parties -- such as the state in this case -- to argue that our state's  
4 constitution means no more than what it meant to its framers at the time of its adoption.

5 In *Lakin v. Senco Products, Inc.*, 329 Or 62, 72, 987 P2d 463 (1999), for  
6 instance, this court sweepingly declared of the right to a jury trial guaranteed in Article I,  
7 section 17, that "whatever the right to 'Trial by Jury' meant in 1857, it means precisely the  
8 same thing today." In *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 118, 23 P3d 333  
9 (2001), to pick another example, the court announced that the purpose of the remedy  
10 clause of Article I, section 10, "is to protect absolute common-law rights respecting  
11 person, property, and reputation, as those rights existed when the Oregon Constitution  
12 was drafted in 1857." And in *State v. Delgado*, 298 Or 395, 401, 692 P2d 610 (1984), to  
13 pick still another, the court held that the question whether the state constitutional right to  
14 bear arms applies to the possession of a switch-blade knife depends on "whether the  
15 drafters would have intended the word 'arms' to include the switch-blade knife[.]"

16 In my view, the idea that the original state constitution means no more than  
17 what it meant to its framers in 1857 is untenable. To begin with, all too often, the state of  
18 the historical record is such that we simply cannot know what the framers had in mind.<sup>6</sup>

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<sup>6</sup> When faced with such circumstances, this court in some cases has attributed to the framers of the Oregon Constitution knowledge of information that there is no evidence they actually possessed. *See, e.g., State v. Cookman*, 324 Or 19, 28-31, 920 P2d 1086 (1996) (attributing to the framers of the Oregon Constitution an intention

1 We do not even know with any certainty that the framers intended that their intentions or  
2 understandings should count in future constitutional interpretation.<sup>7</sup> But even when the  
3 historical record does permit some inferences and conclusions about the original  
4 intentions and understandings of the framers, the idea that those intentions and  
5 understandings are controlling makes the state's highest law little more than a historical  
6 artifact of an era that few in this century actually would choose as a determinant of  
7 individual rights and government authority -- an era, it should be remembered, when  
8 women possessed few political and civil rights, when the common law recognized no  
9 protections for workers, and when the people decreed that a "negro" or "mulatto" who did  
10 not already reside in the state when the constitution was adopted was not permitted to  
11 reside in Oregon. Or Const, Art I, § 35, *repealed* 1926.

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to follow an 1822 Indiana Supreme Court decision interpreting the 1816 version of the Indiana Constitution that was the predecessor to the 1851 Indiana Constitution that is presumed to be the basis for Oregon's *ex post facto* clause, because the decision was, at least in a temporal sense, "available" to the Oregon framers). The effect is to reconstruct a presumed intention that we have no way of knowing accords with reality.

<sup>7</sup> That the delegates to the Oregon Constitutional Convention expressly declined to create any official record of their debates would seem to suggest that they did not care one way or the other. One of the arguments in favor of keeping a record of the convention was precisely to preserve a record of the intentions of the framers for future reference. Charles H. Carey ed., *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857* 140 (1926). But the argument failed to carry the day. Moreover, any suggestion that the prevailing interpretive conventions of the day presumed that the intentions or understandings of the framers would control is at least debatable. See, e.g., John P. Figura, *Against the Creation Myth of Textualism: Theories of Constitutional Interpretation in the Nineteenth Century*, 80 *Miss LJ* 587 (2010) (summarizing various interpretive approaches reflected in nineteenth-century treatises).

1           That is not to say that the historical context for the adoption of a  
2 constitutional provision is irrelevant. All provisions of a state constitution were adopted  
3 at a specific point in history. That history -- including the intentions or understandings of  
4 the framers (or perhaps more precisely, the voters)<sup>8</sup> -- is always relevant. State  
5 constitutions, after all, are commands designed to instruct citizens and government  
6 officials about the powers of government and the limitations on the exercise of those  
7 powers. As such, those commands invite consideration of their intended purposes.<sup>9</sup>

8           A number of constitutional provisions are of relatively recent vintage,  
9 adopted with comprehensive records as to the intentions or understandings of their  
10 makers, and prepared with the obvious expectation that those records be taken into  
11 account in determining the meaning of the provisions. In such cases, it makes much  
12 sense to heed carefully the available evidence of their intended purposes.<sup>10</sup>

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<sup>8</sup> It is common to refer to the intentions of the "framers," but, given that the constitution derives its force from ratification by the people, it is actually the voters, not the framers in the constitutional convention, whose intentions or understandings count. *See Monaghan v. School District No. 1*, 211 Or 360, 367, 315 P2d 797 (1957) ("The constitution derives its force and effect from the people who ratified it and not from the proceedings of the convention where it was framed[.]").

<sup>9</sup> Thus, *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992), appropriately requires an examination of "the historical circumstances" that led to the adoption of a provision of the original constitution. *Priest*, however, does not require, as some of this court's later cases have suggested, that those historical circumstances determine the meaning of the provision at issue.

<sup>10</sup> Accordingly, the approach to constitutional interpretation of amendments adopted by initiative set out in *Ecumenical Ministries v. Oregon State Lottery Comm.*,

1           But much of the original constitution consists of vaguely worded clauses  
2 adopted a century and a half in the past, with little or no record of their meanings or  
3 purposes. In such cases, it is difficult to speak with any precision about the intentions of  
4 the framers. Moreover, whatever we do know of the specific intentions of the framers of  
5 the Oregon Constitution is difficult to apply to modern circumstances that were hardly in  
6 the contemplation of persons who lived in the middle of the nineteenth century. At best,  
7 the historical record will offer, in very general terms, an idea of some underlying  
8 principles that may have animated the original provisions, which principles may be  
9 applied to modern circumstances.<sup>11</sup>

10           The search and seizure clause of Article I, section 9, that is at issue in this  
11 appeal is an excellent case in point. The clause requires that searches and seizures not be  
12 "unreasonable." Beyond the fact that the provision was obviously based on the Fourth  
13 Amendment, there is a complete absence of direct historical evidence of what the framers  
14 intended or what the voters understood about the provision. It was adopted without  
15 discussion in the constitutional convention, and there is no record of public debate about

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318 Or 551, 559-60, 871 P2d 106 (1994), with its focus on ascertaining the intentions of the people who adopted the amendments, seems correct to me.

<sup>11</sup> Some of this court's more recent cases properly reflect that interpretive approach. See, e.g., [State v. Davis](#), 350 Or 440, 446, 256 P3d 1075 (2011) ("[The purpose of historical analysis] is not to freeze the meaning of the state constitution in the mid-nineteenth century. Rather it is to identify, in light of the meaning understood by the framers, relevant underlying principles that may inform our application of the constitutional text to modern circumstances.")

1 it during ratification. *See generally* Claudia Burton & Andrew Grade, *A Legislative*  
2 *History of the Oregon Constitution of 1857--Part I (Articles I & II)*, 37 Willamette L Rev  
3 469, 515 (2001) (search and seizure provisions were passed with "no reported comment  
4 or debate"). Any attempt to reconstruct what the framers or voters might have intended  
5 in adopting Article I, section 9, will yield only speculation. There is no real consensus  
6 among historians about what people thought about search and seizure guarantees in the  
7 late-eighteenth century. There is an especially fierce debate among scholars about the  
8 original understanding of the Fourth Amendment.<sup>12</sup> There is perhaps slightly less  
9 controversy about the general understanding of state search and seizure clauses in the  
10 early- to mid-nineteenth century; it appears that most courts at that time interpreted them  
11 merely to require that searches and seizures be "reasonable" under the circumstances in

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<sup>12</sup> The crux of the debate concerns whether the framers of the Fourth Amendment understood or intended that searches and seizures generally require warrants. Strictly speaking, the Fourth Amendment says only that searches and seizures be reasonable and that warrants should not issue except on probable cause. Some scholars, however, argue that the framers understood the amendment implicitly to require warrants. *See, e.g.,* William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 1602-1791* (2009). Others argue that the Fourth Amendment merely requires that searches and seizures not be unreasonable. *See, e.g.,* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv L Rev 757 (1994). Still others contend that the "reasonableness clause" of the amendment was intended only as a preamble and that the sole purpose of operative provision was to limit the issuance of warrants. *See, e.g.,* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich L Rev 547 (1999). And yet others argue that the Fourth Amendment was originally intended only to regulate the issuance of warrants to search houses. *See, e.g.,* David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 U Pa J Const L 581 (2008).

1 which the actions occurred.<sup>13</sup>

2           A particularly significant problem with trying to apply Article I, section 9,  
3 as it would have been understood back in 1857 is the fact that its very wording invites  
4 analysis that is not historically bound. The requirement that searches and seizures be  
5 "reasonable" seems to me to necessitate constant reassessment in light of changing  
6 circumstances. Trying to determine what is reasonable today by looking solely to  
7 nineteenth-century history seems to me akin to trying to drive a vehicle on an interstate  
8 highway by looking only in the rearview mirror.

9           In short, the majority is correct in rejecting the state's contention that we  
10 should interpret the search and seizure clause of Article I, section 9, to reflect only the  
11 intentions or understandings of its framers in 1857. My point in writing separately is to  
12 explain my view that there are important underlying reasons why we should not interpret  
13 the search and seizure clause that way -- reasons that counsel the exercise of caution and  
14 skepticism in assessing the significance of such nineteenth-century intentions and

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<sup>13</sup> See, e.g., *Rohan v. Sawin*, 59 Mass 281, 284-85 (1850) (purpose of state and federal search and seizure guarantee was solely to require that warrants issue on sworn complaint establishing probable cause); *Wakely v. Hart*, 6 Binn 315, 318 (Pa 1814) (state constitution does not prohibit warrantless searches and requires only that warrants issue on probable cause); *Mayo v. Wilson*, 1 NH 53, 60 (1817) (state constitution "does not seem intended to restrain the legislature from authorizing arrests without warrant, but to guard against the abuse of warrants issued by magistrates"). In fact, as late as 1927, this court held that "the possession of [a] warrant is not the controlling consideration of whether a search is reasonable or unreasonable. An officer armed with a warrant may make an unreasonable search. An officer without a warrant may make a reasonable search." *State v. De Ford*, 120 Or 444, 452, 250 P 220 (1927).

1 understandings as we interpret other provisions of the original constitution, as well.

2 **WALTERS, J.**, dissenting.

3 The majority is bold, and it is deft. The majority begins by affirming the  
4 rule of *stare decisis*, declaring that "the party seeking to change a precedent must assume  
5 responsibility for affirmatively persuading us that we should abandon that precedent" and  
6 deciding that the state did not meet its burden of persuasion in this case. \_\_\_ Or at \_\_\_  
7 (slip op at 8-9). Then, by sleight of hand, the majority reverses its holdings in [State v.](#)  
8 [Hall](#), 339 Or 7, 115 P3d 908 (2005), and [State v. Rodgers/Kirkeby](#), 347 Or 610, 227 P3d  
9 695 (2010), a case that this court decided just three years ago.

10 In *Hall*, police officers unlawfully and unconstitutionally stopped the  
11 defendant without reasonable suspicion of criminal activity. During the illegal stop, the  
12 officers asked for and the defendant gave his consent to search. The officers were polite  
13 and did not threaten or cajole the defendant. There was no evidence that the officers had  
14 acted egregiously. The court nevertheless held that the evidence that the officers  
15 obtained as a result of the consent search *was not admissible* because the state had not  
16 proved "that defendant's decision to consent, even if voluntary, *was not the product* of the  
17 preceding violation of defendant's rights under Article I, section 9." 339 Or at 29  
18 (emphasis added).

19 In this case, the police also unlawfully and unconstitutionally stopped  
20 defendant without reasonable suspicion of criminal activity and asked him for his consent  
21 to search. The majority holds that the evidence that the police obtained when defendant  
22 first consented to the search *was admissible* because it was *not the product* of the

1 preceding violation. \_\_\_ Or at \_\_\_ (slip op at 29). Yet the majority does not overrule its  
2 holding in *Hall*, nor does it distinguish it.

3 In 2010, this court reaffirmed its holding in *Hall* in *State v.*  
4 *Rodgers/Kirkeby*, 347 Or 610. In *Rodgers/Kirkeby*, the court held that the defendants'  
5 consents to search were the products of unlawful detention and must be suppressed. The  
6 court explained:

7 "It was during the period of unlawful detention that the officers requested  
8 that each defendant consent to a search. Here, as in *Hall*, neither defendant  
9 spontaneously granted the officers consent to search; instead, each  
10 defendant gave his consent in response to the officers' requests. The state  
11 does not advance any argument to this court to satisfy its burden under *Hall*  
12 that intervening circumstances or factors severed the connection between  
13 the unlawful seizures and defendants' consent. Thus, as in *Hall*, given the  
14 temporal proximity between the illegal detention and each defendant's  
15 consent, and in the absence of any other intervening circumstances, or other  
16 circumstances mitigating the effect of the unlawful seizures of each  
17 defendant, we conclude that each defendant's consent, even if voluntary,  
18 was the product of police conduct that violated Article I, section 9.

19 Because the consent to search in each case was a product of the unlawful  
20 seizure, the evidence obtained during the search, in both cases, must be  
21 suppressed."

22 *Id.* at 630. The officers in *Rodgers/Kirkeby* did not threaten or cajole the defendants.

23 There was no evidence that the officers acted in an egregious manner. If the holding in

24 *Rodgers/Kirkeby* is no longer good law, why does the majority not overrule it? If

25 *Rodgers/Kirkeby* is still good law, why does the majority not distinguish it?

26 The majority also fails to contend with other cases that should carry  
27 precedential weight. In *Hall*, the court carefully considered those cases and said:

28 "In our view, the circumstances at issue here more closely resemble  
29 the circumstances at issue in *Dominguez-Martinez* and *Toevs*, rather than  
30 the circumstances at issue in *Kennedy* and *Rodriguez*. Similarly to the

1 defendants in *Dominguez-Martinez* and *Toevs*, defendant here consented to  
2 the search during an unlawful stop. Unlike the defendants in *Rodriguez* and  
3 *Kennedy*, defendant's grant of consent was not spontaneous but, instead,  
4 was made only in response to [the officer's] request that defendant allow a  
5 search. [The officer] made that request immediately after he had  
6 questioned defendant about whether defendant was carrying any weapons  
7 or illegal drugs and while he was waiting for the results of defendant's  
8 warrant check. Given the close temporal proximity between the illegal  
9 detention and defendant's consent, and the absence of any intervening  
10 circumstances or other circumstances mitigating the effect of that unlawful  
11 police conduct, we cannot say that the state has proved that defendant's  
12 decision to consent, even if voluntary, was not the product of the preceding  
13 violation of defendant's rights under Article I, section 9. We therefore  
14 conclude that the unlawful seizure of defendant vitiated his consent to the  
15 search and, for that reason, the evidence from that search is inadmissible  
16 under Article I, section 9."

17 339 Or at 36. In this case, the majority relies heavily on *Rodriguez*, a case that the court  
18 considered and distinguished in *Hall*, but says nothing about *Dominguez-Martinez* and  
19 *Toevs*, the cases that the court cited in support of its decision in *Hall*. Are those cases no  
20 longer good law, or are they distinguishable? The majority does not say.

21 The majority justifies its failure to grapple with the need for stability and  
22 predictability that the rule of *stare decisis* fosters by claiming that it has merely  
23 "clarified" *Hall* while continuing to adhere to the precept that a court must suppress  
24 evidence obtained from a consent search if the consent was obtained "through  
25 exploitation of the unlawful police conduct." \_\_\_ Or at \_\_\_ (slip op at 8).<sup>14</sup> *Hall* and

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<sup>14</sup> In 2011, this court reiterated that "[f]ew legal principles are so central to our tradition as the concept that courts should '[t]reat like cases alike,' \* \* \* and *stare decisis* is one means of advancing that goal." *Farmers Ins. Co. v. Mowry*, 350 Or 686, 698, 261 P3d 1 (2011) (second alteration in original; citation omitted).

1 *Rodgers/Kirkeby* undoubtedly stand for that precept, but they do not stand for that precept  
2 alone. They also stand for the rule that evidence is obtained through exploitation when  
3 the police unlawfully stop citizens and, while continuing to detain them without legal  
4 authority to do so, request that they submit to search. Under *Hall* and *Rodgers/Kirkeby*,  
5 the law has been that, in the absence of intervening or mitigating circumstances, the  
6 evidence that the police obtain must be suppressed *even when the citizens' consents to*  
7 *search are voluntary*. This court may distinguish or even reverse those holdings, but it  
8 should do so openly and in accordance with the rule of *stare decisis*. Because the  
9 majority does otherwise, I ask the question that all citizens have the right to ask: What  
10 force does the rule of law have if a court can avoid it by refusing to call it by its right  
11 name?

12 I press my point because, in effectively overruling *Hall* and  
13 *Rodgers/Kirkeby*, the majority changes the exclusionary rule as Oregon has known it and,  
14 in my view, does so to the detriment of Oregonians. The majority defends its decision by  
15 saying that *Hall's* exploitation test "failed to give sufficient weight to a defendant's  
16 voluntary consent to a search." \_\_Or at \_\_ (slip op at 24). But as the majority so aptly  
17 explains, whether a defendant's consent was voluntary is a question that is distinct from  
18 the question of whether the evidence that the police obtained was a product of their  
19 illegal conduct. *Id.* at 12.

20 The aim of the Oregon exclusionary rule is to restore a defendant to the  
21 same position as if "the government's officers had stayed within the law." *State v. Davis*,  
22 295 Or 227, 234, 666 P2d 802 (1983). Before today, this court had "rejected the view

1 that the Oregon exclusionary rule is predicated upon a deterrence rationale" and instead  
2 had adopted a rule "that serves to vindicate a defendant's personal rights. In other words,  
3 the right to be free from unreasonable searches and seizures under Article I, section 9,  
4 also encompasses the right to be free from the use of evidence obtained in violation of  
5 that state constitutional provision." *Hall*, 339 Or at 24 (citing *State v. Davis*, 313 Or 246,  
6 249, 834 P2d 1008 (1992)).

7 The majority's new test focuses not on whether the police violated a  
8 defendant's constitutional right against unreasonable seizure and obtained evidence as a  
9 result, but on whether the police also engaged in purposeful or additional misconduct that  
10 may have affected the defendant's decision to consent. The majority justifies  
11 consideration of those factors by explaining that

12 "police misconduct that is intended to gain a defendant's consent may well  
13 be more likely to substantially affect that defendant's decision to consent.  
14 Likewise, particularly egregious police misconduct -- such as excessive use  
15 of force in unlawfully seizing a defendant -- is more likely to affect the  
16 defendant's decision to consent than more restrained police behavior."

17 \_\_\_ Or at \_\_\_ (slip op at 21). I do not quarrel with that reasoning; I question its role in  
18 the exploitation analysis.

19 When the police unconstitutionally stop or detain a defendant and act with  
20 an illegal purpose or engage in egregious misconduct, a court must consider whether the  
21 defendant's subsequent consent to search is voluntary. Police actions that deprive a  
22 defendant of constitutional rights or exert unconstitutional coercion may render a  
23 defendant's consent involuntary. *See State v. Kennedy*, 290 Or 493, 624 P2d 99 (1981).  
24 But, as the majority acknowledges, *even when a defendant's consent is voluntary*,

1 evidence that is the product of illegal police misconduct is subject to suppression. \_\_\_ Or  
2 at \_\_\_ (slip op at 12-13). In this case, the majority's decision that the evidence that the  
3 police obtained was admissible because the police actions, although illegal, were not  
4 egregious and may not have affected defendant's decision to consent may reflect an  
5 accurate assessment that defendant's consent was voluntary in the sense that it was an act  
6 of free will. However, the majority fails to grapple sufficiently with whether defendant's  
7 consent was, nevertheless, a product of the officer's unlawful stop and detention. *Hall*  
8 and *Rodgers/Kirkeby* recognize the reality of the power imbalance that exists when the  
9 police use their authority to unlawfully stop and detain a person and then, while  
10 continuing to exert that authority, seek consent to search. The majority conflates the  
11 voluntariness and exploitation prongs of the analysis and wrongly fails to give sufficient  
12 effect to the constitutional mandate of the exclusionary rule in Oregon -- that courts apply  
13 it to vindicate a defendant's personal right against unconstitutional seizure. *Hall*, 339 Or  
14 at 24; *Davis*, 313 Or at 249.

15           The majority's new test also upends the Oregon exclusionary rule in other  
16 ways. Before today, the inquiry that the court used to decide whether police had  
17 exploited an illegality and obtained evidence that must be suppressed was an objective,  
18 logical one that did not require analysis of the subjective motivation of the police in  
19 seeking a defendant's consent to search or of the subjective effect that the police  
20 misconduct had on a defendant's decision to give consent. By adopting an exploitation  
21 test that now permits or even requires both, the majority shifts away from the objectivity  
22 and logic of the exploitation prong of the analysis and imposes a test that is both more

1 intrusive and less clear. It may seem right to instruct courts and officers to consider "the  
2 totality of the circumstances," but police officers and trial courts endeavor to make  
3 decisions that this court will uphold and are entitled to more guidance than the majority  
4 gives. If the facts unfold as they did in *Hall* and *Rodgers/Kirkeby*, must the trial court  
5 suppress the evidence as this court required in those cases, or, considering the fact that  
6 the police were polite, must the trial court now admit the evidence?

7           Until today, certain consequences followed when the police illegally and  
8 unconstitutionally stopped citizens without probable cause or reasonable suspicion and,  
9 while continuing to unlawfully detain them, asked for and obtained their consent to  
10 search. Today, the majority has eliminated, or at least substantially altered, the certainty  
11 that the violation of a defendant's constitutional rights will be vindicated. If the majority  
12 had acknowledged and attempted to justify its abandonment of precedent, I might be  
13 more satisfied as a judge, but I do not know that I would be more comfortable as a  
14 citizen.

15           The majority is bold, and it is deft. In my view, the majority is also wrong.  
16 I respectfully dissent.

17           De Muniz, Senior Judge, Justice pro tempore, joins in this dissent.

18