IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. MARIO ARREOLA-BOTELLO, Defendant-Appellant, Petitioner on Review.	Washington County Circuit Court No. C151713CR CA A161566 SC S066119

BRIEF ON THE MERITS OF RESPONDENT 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 D. CHARLES BAILEY, JR., Judge

Per Curiam Opinion Filed: May 31, 2018
Before: Lagesen, Presiding Judge, and DeVore, Judge,
and James, Judge

Continued…

ERNEST G. LANNET #013248
Chief Defender
Office of Public Defense Services
JOSHUA B. CROWTHER #032998
Deputy Public Defender
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email:
joshua.b.crowther@opds.state.or.us

Attorneys for Petitioner on Review

ROSALIND M. LEE #055566
Rosalind Manson Lee LLC
474 Willamette St., Ste. 302
Eugene, Oregon 97401
Telephone: (541) 485-5110
Email: ros@mansonlee.com

Attorney for Amicus Curiae

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
DAVID B. THOMPSON #951246
Senior Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email:
david.b.thompson@doj.state.or.us

Attorneys for Respondent on Review

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STATEMENT OF THE CASE

Article I, section 9, of the Oregon Constitution prohibits "unreasonable search, or seizure."[1] A police officer's question to a citizen by itself is neither a search nor a seizure and thus ordinarily does not implicate Article I, section 9. As explained below, police questioning during a traffic stop that is unrelated to processing the traffic violation does not violate Article I, section 9, so long as it does not lengthen or change the fundamental character of the stop. An unrelated question during a traffic stop is constitutionally significant in only two circumstances: if it extends the stop's duration or if it converts the stop into a criminal investigatory stop.

In this case, defendant challenges the trial court's denial of his motion to suppress methamphetamine a police officer found in a consent search of his car incident to a traffic stop. Specifically, he argues that suppression was required because the officer violated Article I, section 9's prohibition against unreasonable seizures by asking for consent to search for contraband, a criminal investigatory inquiry that was neither related to processing the traffic stop nor

[1] Article I, section 9, provides in part that "[n]o law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure[.]"

supported by reasonable suspicion of criminal activity or some other articulable justification. That violation, defendant contends, tainted the consent to search and rendered the resulting evidence inadmissible.

But the officer's mere request for consent to search did not implicate Article I, section 9, because it neither lengthened defendant's overall detention nor converted the traffic stop into a criminal stop. In short, the request was not a search or a seizure.

Question Presented

Is Article I, section 9, of the Oregon Constitution violated when, during a lawful traffic stop and without extending its duration, a police officer requests consent to search for contraband, even though the officer lacks reasonable suspicion of criminal activity or some other articulable justification for the request?

Proposed Rule of Law

No. An officer does not violate Article I, section 9, when, during a lawful traffic stop and without extending its duration, the officer requests consent to search for contraband. In those circumstances, such a request does not constitute an Article I, section 9, search or seizure.

Statement of Historical and Procedural Facts

Officer Erik Faulkner of the Beaverton Police Department stopped the car defendant was driving after seeing him commit a traffic violation. (Tr 7, 9-

10). Faulkner asked defendant for his driver's license, vehicle registration, and proof of insurance. (Tr 11). Defendant handed the officer a license but did not immediately produce the registration or proof of insurance. (Tr 12). Defendant searched approximately three to four minutes for those documents. (*Id*.). During that time, Faulkner asked for consent to search defendant's car for contraband.[2] (*Id*.). Defendant replied, "Sure, okay." (*Id*.). As Faulkner opened the car door for defendant to exit in preparation for the search, the officer saw and seized "a small bindle" of methamphetamine on the floorboard. (Tr 13, 15-16, 23, 27).

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[2] At the motion-to-suppress hearing, Faulkner explained that, when he asks someone for consent to search, he does it the same way every time:

> [OFFICER FAULKNER:] Every time I ask somebody, it's always the same way. While they're searching for documents and stuff, ask them if they would be willing to consent to a search for anything illegal, guns, drugs, knives, bombs, illegal documents or anything else they're not allowed to possess.

(Tr 14). He testified that he made a similarly worded request to defendant. (Tr 21).

Defendant asserts that Faulkner, prior to requesting consent to search, "asked [him] whether he had any weapons or drugs." Pet BOM 5. But Faulkner's testimony was confusing on that point. (Tr 20-21). Although he made it clear that he had requested consent to search, he was not so clear about whether he had separately and distinctly asked defendant about possession of weapons or drugs. (*Id*.). The trial court found only that Faulkner had requested consent to search; it made no finding one way or the other about an inquiry regarding weapons or drugs. (Tr 29). Accordingly, the state's statement of facts goes no further than the trial court's findings.

Defendant moved the trial court to suppress that evidence, arguing, among other things, that Faulkner "illegally expanded" a lawful traffic stop by requesting consent to search while defendant was looking for vehicle registration and proof of insurance. (Tr 26). The trial court rejected defendant's argument. It agreed with the state's contention that, under current Court of Appeals case law, Officer Faulkner lawfully requested consent to search for contraband during an "unavoidable lull" in the traffic stop—*i.e.*, "as the officer was waiting for the defendant to come up with the registration and proof of insurance." (Tr 24, 28-29). The court subsequently convicted defendant of unlawful possession of methamphetamine (ORS 475.894). (Tr 28-30).

On appeal, defendant argued that the trial court had erroneously refused to suppress the challenged evidence, because Faulkner's request for consent to search for contraband—a criminal investigatory inquiry unrelated to processing the traffic stop—"unlawfully extended and prolonged the stop." App Br 7. The Court of Appeals affirmed, citing its "unavoidable lull" case law. *State v. Arreola-Botello*, 292 Or App 214, 418 P3d 785 (2018) (*per curiam*). This court allowed review. *State v. Arreola-Botello*, 363 Or 727, 429 P3d 384 (2018).

Summary of Argument

A police officer lawfully stopped defendant's car for a traffic infraction. The officer requested defendant's driver's license, registration, and proof of

insurance. While defendant was looking for those documents, the officer asked if he could search defendant's car for contraband. That request did not lengthen the duration of defendant's detention incident to the traffic stop. Defendant voluntarily consented to the search, the officer found contraband, and defendant was subsequently convicted of unlawfully possessing methamphetamine.

Contrary to defendant's argument that the officer's request for consent violated Article I, section 9's prohibition against unreasonable seizures and that the resulting evidence should have been suppressed, the request, even though not reasonably related to processing the traffic stop, was not a seizure for constitutional purposes. Because the request did not lengthen the traffic stop's duration and did not otherwise restrain defendant's freedom of movement beyond the restraint already in place by virtue of the traffic stop, the request did not constitute a seizure. This court's well-settled test for determining when police have seized a person under Article I, section 9, compels that conclusion. This court's duration-based rule for determining whether an investigatory stop lawful at its inception has become illegal also compels that conclusion. Under that rule, the test is simply whether the police have detained the citizen for a longer period than the circumstances justify. This court therefore should hold that the officer's request for consent neither implicated nor violated Article I, section 9.

This court should not hold, as defendant contends, that the request for consent was an unlawful seizure under his proposed "subject-matter scope" rule. That rule prohibits a police officer conducting a traffic stop from making *any* unrelated inquiry—whether or not the inquiry prolongs the traffic stop—unless the inquiry is supported by a constitutionally sufficient justification independent of the justification for the traffic stop. But defendant's rule—which depends on defining "liberty" in way that is foreign to this court's understanding of that term in the context of determining whether the police have seized a person in the constitutional sense—cannot be squared with this court's Article I, section 9, jurisprudence. For that reason, this court should decline defendant's invitation to adopt his new "seizure" rule.

ARGUMENT

At issue in this case is the validity of two overlapping principles that constitute what the Court of Appeals has called the "unavoidable lull" rule. The first principle is that, during a traffic stop, police may—without violating Article I, section 9—make unrelated inquiries while they are lawfully and expeditiously processing the traffic violation. *See State v. Nims*, 248 Or App 708, 713-14, 274 P3d 235, *rev den*, 352 Or 378 (2012) (to determine whether traffic stop was unlawfully extended, court asks whether police were "expeditiously proceeding with steps necessary to complete the stop"; no extension of traffic stop where one officer requested consent to search

defendant's car while another officer was diligently writing citation). The second principle is that, in a traffic stop, "an officer is free to question a motorist about matters unrelated to the traffic infraction during an unavoidable lull in the investigation, such as while awaiting the results of a records check," even though "that officer is not similarly free to question the motorist about unrelated matters as an alternative to going forward with the next step in processing the infraction, such as writing or issuing a citation." *State v. Rodgers*, 219 Or App 366, 372, 182 P3d 209 (2008), *aff'd sub nom*, *State v. Rodgers/Kirkeby*, 347 Or 610, 227 P3d 695 (2010); *see also State v. Gomes*, 236 Or App 364, 372, 236 P3d 841 (2010) (officer lawfully asked defendant about suspicious cigarette package while defendant was "in the process of obtaining and turning over the license[], registration, and proof of insurance").

Those two principles—which permit a police officer to make unrelated inquiries during a traffic stop so long as they do not extend the stop's duration—underpin the Court of Appeals' holding in this case that Officer Faulkner did not violate Article I, section 9, when he requested consent to search while waiting for defendant to find and produce the requested vehicle registration and proof of insurance. As explained below, a police officer's request for consent to search—made while the officer is processing a traffic stop and without lengthening the duration of the motorist's detention incident to the traffic stop—is neither a search nor a seizure, and thus does not implicate

Article I, section 9. *See State v. Howard/Dawson*, 342 Or 635, 640, 157 P3d 1189 (2007) ("As its terms imply, Article I, section 9, applies only when government officials engage in a 'search' or a 'seizure.'"). Because Officer Faulkner's request for defendant's consent to search was precisely that kind of request, it was constitutionally insignificant. In short, the request did not infringe defendant's constitutional right to be free from unreasonable seizures.

A. Officer Faulkner's request for consent to search did not implicate Article I, section 9.

1. The request for consent was not an Article I, section 9, search.

An officer's request for consent to search for contraband is never, by itself, a "search" under Article I, section 9. This court made that clear in *State v. Rodgers/Kirkeby*, 347 Or 610, 227 P3d 695 (2010), where it held that, "[i]n the context of a consent search, a police request for consent to search is not itself a search and does not invade the privacy of a citizen." 347 Or at 641. *See also State v. Newcomb*, 359 Or 756, 764, 375 P3d 434 (2016) ("For purposes of Article I, section 9, a search occurs only if governmental action invades a protected privacy interest." (internal quotation marks omitted)).[3] Faulkner's request for defendant's consent therefore was not a search. The issue thus is

[3] Defendant apparently agrees that a request for consent to search is not itself a search under Article I, section 9, given that he argues only that Faulkner unlawfully *seized* him by requesting consent. He does not suggest that the request was also a search.

whether the request was a *seizure*, which is the only way that it could implicate Article I, section 9.

2. The request for consent was not an Article I, section 9, seizure.

Under this court's case law concerning the boundaries of permissible police conduct during traffic stops, Faulkner's request for consent to search did not effect an Article I, section 9, seizure of defendant. That is so because the request itself did not extend the duration of the traffic stop—a fact that the trial court implicitly found. The Court of Appeals' "unavoidable lull" rule requires that an unrelated police inquiry during a traffic stop not extend the duration of that stop. *State v. Marino*, 259 Or App 608, 614, 314 P3d 984 (2013). In applying the rule here, the trial court necessarily found that Faulkner's request for consent added no time to defendant's detention incident to the traffic stop—a finding the evidence supports. (Tr 12-13). This court therefore is bound by that finding, which, as explained below, compels the conclusion that Faulkner's request for consent did not implicate Article I, section 9. *See State v. Miller*, 363 Or 374, 377, 422 P3d 240, *adh'd to as modified on recons*, 363 Or 742, 428 P3d 899 (2018) (this court is bound by the trial court's express and implicit findings of historical fact in support of its denial of a motion to suppress if the record evidence supports the findings).

a. A request for consent that does not extend a traffic stop's duration does not impose additional restraint beyond the stop itself.

A request for consent to search that does not extend the duration of a motorist's detention beyond that associated with the traffic stop—like the request at issue in this case—is not an Article I, section 9, seizure because the request does not impose any restraint on the motorist's liberty or freedom of movement *beyond that already in place by virtue of the traffic stop*. In other words, no greater or second seizure—independent of or in combination with the traffic stop—is created by a request for consent that an officer makes simultaneously with processing the traffic violation. Under those circumstances, the restraint on the motorist's freedom or liberty of movement is attributable to the traffic stop only; it has nothing to do with the request for consent.

At the point that Officer Faulkner requested defendant's consent to search his car for contraband, Faulkner was reasonably waiting for him to produce his registration and proof of insurance, pursuant to usual traffic-stop procedure. *See State v. Watson*, 353 Or 768, 782 n 15, 305 P3d 94 (2013) (citing with approval *United States v. Shabazz*, 993 F2d 431, 437 (5th Cir 1993) ("[W]e have no doubt, that in a valid traffic stop, an officer can request a driver's license, insurance papers, vehicle registration, run a computer check

thereon * * *.")).[4] Because the officer requested consent to search simultaneously with an activity reasonably related to processing the traffic violation, *i.e.*, waiting for defendant to produce driving-related documents, the request itself did not extend the duration of defendant's detention beyond that associated with the traffic stop. That is, the request did not further restrict defendant's freedom of movement by extending the baseline traffic-stop detention. Consequently, the request was not a seizure and did not implicate Article I, section 9.

This court's test for determining whether a person has been seized under Article I, section 9, compels that conclusion. A person is seized only if, under the totality of the circumstances, "a reasonable person [would] believe that a law enforcement officer [has] intentionally and significantly restricted, interfered with, or otherwise deprived the individual of his or her liberty or freedom of movement." *State v. Backstrand*, 354 Or 392, 399, 313 P3d 1084 (2013). More specifically, "[a]n officer seizes a person only if the officer's words, manner, or actions would convey to a reasonable person that the officer is exercising his or her authority to restrict the person's liberty or freedom of movement in a significant way—that is, in a way that exceeds ordinary social

[4] Defendant does not dispute the reasonableness of Faulkner waiting for him to produce the registration and proof of insurance; nor does he suggest that the three- to four-minute waiting period was unreasonably long.

boundaries." *State v. Highley*, 354 Or 459, 468, 313 P3d 1068 (2013).

A reasonable motorist stopped for a traffic violation would not believe that an officer's mere request for consent to search—made while the officer is doing something related to the traffic stop—restricts the motorist's freedom of movement beyond the restriction already in place by virtue of the traffic stop. Put differently, a reasonable motorist would not believe that such a request, considered individually or in combination with the underlying traffic stop, has significantly restricted the motorist's freedom of movement in a manner different from the traffic stop. Rather, a reasonable motorist would believe that the request for consent, although it goes beyond the officer's investigation and processing of the traffic violation, has no effect on the existing, traffic-stop-related restraint on freedom of movement, which continues unchanged despite the request.

In sum, as far as any physical restraint is concerned, the motorist is subjected to nothing more than the continuing, lawful exercise of police authority to significantly restrict a person's freedom of movement in order to process an observed traffic violation. And a reasonable motorist would recognize that. As a result, Faulkner's request for consent—considered either individually or in combination with the existing traffic stop—did not seize defendant independently of or in addition to the existing seizure. *See Highley*, 354 Or at 461, 473 ("we conclude that the officer did not seize defendant by

asking for his identification and checking defendant's probationary status based on that identification or by asking defendant for consent to search"; "[c]onsidered in combination, [the officer's actions] were simply acts that occurred sequentially[,] [and] [t]hey did not combine to form a whole greater than the sum of their parts"). Because the request did not effect a seizure, it did not require any of the justifications a police officer must have to lawfully seize a person without a warrant under Article I, section 9.[5]

b. This court's decision in *Watson* supports that conclusion.

A similar duration-based analysis underpins this court's holding in *Watson* that a warrants check during a traffic stop—even if unrelated to the investigation or processing of the traffic violation for which the defendant was stopped—did not violate Article I, section 9, because the check added no time

[5] The state acknowledges that the manner in which an officer requests consent to search may, considering the totality of the circumstances, give the request Article I, section 9, significance, even though the request does not extend the traffic stop's duration. If the request were made in a plainly accusatory way, for example, it could, in combination with other circumstances, convert the traffic stop into a criminal investigatory stop, which must be supported by at least reasonable suspicion of criminal activity. *See Highley*, 354 Or at 472-73 (discussing the possibility that the manner in which police conduct themselves in contacting a citizen may transform a "mere encounter" into a "stop"); *State v. K.A.M.*, 361 Or 805, 810-13, 401 P3d 774 (2017) (officer's accusatory statement may, along with other circumstances, effect a seizure of a person). But Officer Faulkner's request for consent to search was casual and noncoercive (Tr 12-15); nothing in the record suggests that the manner of the request converted the traffic stop into a criminal stop. Defendant does not argue that it did.

to the stop. That analysis should control this case.

In *Watson*, a police officer stopped the defendant's car for a traffic violation. 353 Or at 769. After informing the defendant of the violation, the officer decided to issue him a warning instead of a citation. *Id*. at 770. Nevertheless, the officer asked the defendant for his driver's license, registration, and proof of insurance. *Id*. After the defendant produced those documents, the officer, per his usual practice, contacted dispatch and requested a records check (to determine whether the defendant's driver's license was valid) and a warrants check. *Id*. Approximately ten minutes later, dispatch informed the officer that the defendant's license was valid and that there were no outstanding warrants. *Id*. at 771.

During the ten-minute waiting period for the results of the records and warrants checks, the officer developed probable cause to believe the defendant's car contained illegal drugs. *Id*. He searched the car, finding marijuana and cocaine, for which the defendant was arrested and later convicted on possession and delivery charges. *Id*. at 771-72. In this court, the defendant argued that the trial court should have suppressed that evidence because the records and warrants checks each "constituted an independent investigation into other wrongdoing that exceeded both the lawful duration and scope of the [traffic] stop." *Id*. at 772. The defendant's specific argument was that, "because [the officer] decided not to issue * * * a citation and did not doubt

[the] defendant's identity as it appeared on the face of [the] defendant's driver's license, [the officer] exceeded the limits of Article I, section 9, by detaining [him] for 10 minutes to conduct records and warrants checks." *Id*. at 781.

Rejecting the defendant's argument, this court began its analysis by stating the applicable law:

> [B]oth Oregon statutes and this court's Article I, section 9, case law require that law enforcement officers have a justification for temporarily seizing or stopping a person to conduct an investigation, and that the officer's activities be reasonably related to that investigation and reasonably necessary to effectuate it. If the officer's activities exceed those limits, then there must be an independent constitutional justification for those activities.

Id. at 781. This court then analyzed the records check and the warrants check separately, concluding that because neither had impermissibly extended the duration of the defendant's detention, the officer had not seized him in violation of Article I, section 9. *Id*. at 782-84.

This court first held that the records check, conducted "with the purpose of verifying [the] defendant's driving privileges," was constitutional. That check did not violate Article I, section 9, because it was reasonably related to the officer's investigation of the traffic violation and the attendant detention of the defendant "was not unreasonably lengthy." *Id*. at 782-83.

Moving to the warrants check, this court held that even if that check was not reasonably related to the traffic investigation (a question the court did not have to decide), it did not render the defendant's detention unconstitutional. *Id*.

at 783-84. In so concluding, this court emphasized that the warrants check did not add any time to the defendant's detention incident to the traffic stop:

> [A]lthough incriminating evidence was discovered during the time that it took to conduct the warrants check, [the officer]'s records check, which was reasonably related to the [traffic] investigation, took the same amount of time. [The officer] requested the records and warrants check simultaneously and received the results of those checks from dispatch simultaneously; the record does not demonstrate that it took [the officer] longer to conduct the warrants check than it would have taken to conduct the records check alone. There is no indication that the warrants check * * * *extended the duration of the stop beyond the time that was reasonably necessary to conduct the records check*; thus, even if the warrants check was not reasonably related to the [traffic] investigation, it was not a basis for suppression of the incriminating evidence that the police discovered.

Id. at 784 (emphasis added). That duration-based analysis necessarily adopts the following rule: Even if a police inquiry during a traffic stop is not reasonably related to the traffic investigation (in *Watson*, the warrants check), the unrelated inquiry does not implicate Article I, section 9, if it is made simultaneously with an activity that is reasonably related to the traffic investigation (in *Watson*, the records check) and thus does not extend the duration of the traffic stop beyond the time associated with processing that stop.[6]

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[6] This clearly is a holding, albeit an alternative holding to the court's other holding that "the warrants check did not lead to the discovery of evidence that defendant sought to suppress" and thus "was not a basis for suppression of the incriminating evidence that the police discovered." *Watson*, 353 Or at 784.

Footnote continued…

c. *Watson* is consistent with the rest of this court's case law on traffic stops, which focuses on the seizure's duration.

Watson's analysis of the warrants check comports with this court's consistent application of a duration-based test for determining whether a lawful investigatory detention of a person has become an illegal detention under Article I, section 9. As noted in *Watson*, 353 Or at 775, the basic principles for investigatory detentions under Article I, section 9, were first developed in *State v. Cloman*, 254 Or 1, 456 P2d 67 (1969). There, "this court borrowed the reasoning from federal Fourth Amendment jurisprudence and adopted it for the purposes of Article I, section 9." *Watson*, 353 Or at 775 (citing *Terry v. Ohio*, 392 US 1, 88 S Ct 1868, 20 L Ed 2d 889 (1968)).[7] "The court held that the

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(…continued)
The conclusion that the warrants check did not extend the duration of the traffic stop was necessary to deal with the fact that the "incriminating evidence was discovered during the time it took to conduct the warrants check." *Id*. Had the warrants check unlawfully extended the duration of the traffic stop, then evidence found during the unlawful extension obviously would have been tainted by that illegality and subject to suppression.

[7] In *Terry*, the Court held:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own safety or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the

Footnote continued…

limited detention of criminal suspects based on particularized reasonable suspicion was constitutional, recognizing that such stops were required by the 'practical necessities of effective law enforcement' and emphasizing that a 'brief, informal' detention for purposes of on-the-scene investigation is a more limited intrusion into a person's liberty than an arrest." *Id*. (citing and quoting *Cloman*, 254 Or at 8-9). *Cloman*'s emphasis on "limited detention" and "brief detention" in describing a lawful investigatory stop is the foundation for this court's consistent view that—in determining whether a lawful stop has become an unlawful seizure under Article I, section 9—the key question is whether the *duration* of police restraint on a citizen's freedom of movement was justified. In other words, did the police detain the citizen for a longer period than the circumstances justified? *See also State v. Warner*, 342 Or 361, 373, 153 P3d 674 (2007) (noting that under ORS 810.410, which codifies the *Cloman/Terry* principles for purposes of traffic stops, "the interlude of detention when a person is stopped [for a traffic violation] must be no longer than necessary to investigate the violation").[8]

(…continued)

> outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

392 US at 30.

[8] In *Watson*, this court identified ORS 810.410 as one of the statutes in which "the Oregon legislature sought to codify the constitutional limitations

Footnote continued…

This court made that clear in *Rodgers/Kirkeby*, its seminal traffic-stop case. There, this court first held that the police had unlawfully seized defendant Rodgers by continuing to significantly restrict his freedom of movement "after completion of the investigation of the traffic violation," in order to ask him unrelated criminal investigatory questions for which the police lacked "a reasonable suspicion of criminal activity that justified [his] continued detention." 347 Or at 627. Second, this court held that defendant Kirkeby was seized in violation of Article I, section 9, because "further detention of [him by the police after he should have been issued a traffic citation and sent on his way] was a significant limitation on [his] freedom of movement * * * not justified by reasonable suspicion of criminal activity." *Id*. at 628. Those "unlawful seizure" holdings were based solely on the conclusion that the *duration* of the defendants' detention exceeded that permitted by Article I, section 9, and that that durational violation is what created the constitutional problem. In *Backstrand*, this court explained *Rodgers/Kirkeby* in precisely those terms: "the verbal inquiries alone continued the seizures [of defendants], and continuation of the seizures was unlawful." *Backstrand*, 354 Or at 407.

(…continued)
that *Cloman* and *Terry* had articulated." *Watson*, 353 Or at 775-76. This court has recently stated that—when deciding Article I, section 9, questions concerning investigatory stops—it will, "as appropriate," borrow from its decisions applying statutory law to investigatory stops. *State v. Maciel-Figueroa*, 361 Or 163, 171-72, 389 P3d 1121 (2017).

See also State v. Pichardo, 360 Or 754, 765-66, 388 P3d 320 (2017) (explaining in durational terms the court's holding that an unrelated police inquiry during a hybrid traffic/criminal-investigatory stop unlawfully extended the stop: officer "extended the stop, not to ask a question that was reasonably related to the stop but to ask an unrelated question about other criminal conduct for which he had no reasonable suspicion").[9]

Significantly, under Fourth Amendment law, in which Oregon's constitutional and statutory investigatory-stop law is rooted, duration is the sole test for determining whether unrelated police inquiries during an investigatory stop, including a traffic stop, affect the legality of the stop. The United States Supreme Court has held that, during a traffic stop, police may ask questions unrelated to the reason for the stop without violating the Fourth Amendment, so long as the unrelated questions do not measurably extend the duration of the

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[9] *Rodgers/Kirkeby*'s duration-based holdings also explain this court's decision in *State v. Jimenez*, 357 Or 417, 353 P3d 1227 (2015), that a police officer's suspicionless inquiry about weapons possession during a traffic stop—an inquiry that was not reasonably related to processing the stop—violated Article I, section 9. The officer's question about weapons, which was asked at a point when the officer was not otherwise engaged in traffic-stop-related activity, 357 Or at 420, necessarily extended the duration of the defendant's detention. In other words, the weapons inquiry—like the unrelated inquiries in *Rodgers/Kirkeby* but unlike the warrants check in *Watson*—extended the duration of the defendant's detention *beyond* the period of detention associated with the traffic stop. And that is why the weapons inquiry and the attendant additional detention, which lacked an articulable justification different from the justification for the traffic stop, violated Article I, section 9's prohibition against unreasonable seizures.

stop. *See, e.g.*, *Rodriguez v. United States*, ___ US ___, 135 S Ct 1609, 1614, 1615, 191 L Ed 2d 492 (2015) ("[b]ecause addressing the infraction is the purpose of [a traffic] stop, it may last no longer than is necessary to effectuate that purpose"; "[a]n officer * * * may conduct certain unrelated checks during a lawful traffic stop[,] [b]ut * * * he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual" (brackets and internal quotation marks omitted)); *Arizona v. Johnson*, 555 US 323, 333, 129 S Ct 781, 172 L Ed 2d 694 (2009) ("An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.").

Watson's identical duration-based rule, applied to defendant's case, compels the conclusion that Officer Faulkner's request for defendant's consent to search did not violate Article I, section 9. That inquiry, although unrelated to processing the traffic stop, was made simultaneously with an activity indisputably related to that mission (*i.e.*, waiting for defendant to find and produce driving-related documents). Therefore, Faulkner's request for consent—just like the warrants check in *Watson*—did not violate the

constitutional prohibition against unreasonable seizures.[10]

In sum, because Faulkner's request for consent to search did not prolong defendant's detention beyond that associated with processing the traffic stop, it was not a seizure and thus was constitutionally insignificant. Defendant's contrary argument on review—that the request violated the durational limits on

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[10] *Rodgers/Kirkeby* and *Watson* provide the backdrop against which the following statement in *State v. Miller*, 363 Or 374, 380, 422 P3d 240 (2018), must be read: "[W]hen the officer asks a question that is not reasonably related to the reason for the stop, the question extends the stop, and Article I, section 9, requires that there be an independent basis to justify the extension." That statement cannot be read to mean that *all* unrelated questions extend the *duration* of the stop and therefore must be independently justified to comport with Article I, section 9. To read the statement that way ignores the fact that unrelated questions an officer asks simultaneously with the officer's ongoing traffic-stop-related activity add no time to the duration of the traffic stop—a fact that this court expressly relied on in *Watson* when it held that the warrants check there, even if unrelated to processing the traffic stop, did not implicate Article I, section 9, because the check, conducted simultaneously with a traffic-stop-related activity (the records check), did not extend the traffic stop's *duration*.

The same is true for the following additional statement in *Miller*: "Although an officer's verbal inquiries 'are not searches and seizures and thus by themselves ordinarily do not implicate Article I, section 9,' when a person is already stopped, the person 'is not free unilaterally to end the encounter and leave whenever he or she chooses,' so questions that are not reasonably related to the purpose of the stop extend the stop in a way that requires some independent justification under Article I, section 9." 363 Or at 380 n 4 (quoting *Rodgers/Kirkeby*, 347 Or at 622-23). In light of the clear, duration-based analysis that underpinned both *Rodgers/Kirkeby* and *Watson*, that statement must be read as saying no more than the following: unrelated questions during an investigatory stop "extend the stop in a way that requires some independent justification under Article I, section 9," *when the unrelated questions extend the duration of the citizen's detention beyond that associated with the investigatory stop*.

a traffic stop under Article I, section 9, and thus constituted an unconstitutional warrantless seizure of him (Pet BOM 34-35)—is incorrect. In concluding that the request did not violate Article I, section 9, the trial court correctly applied the "unavoidable lull" rule, which mirrors the duration-based rule that this court applied in *Watson* with respect to the warrants check and that underpins this court's other decisions concerning unrelated police inquiries during a traffic stop.

B. This court should reject defendant's proposed "subject-matter scope" rule.

Defendant's main argument on review is that "unrelated investigatory questions unlawfully expand the permissible subject-matter scope of [a] traffic stop, because those questions are not reasonably related to processing or investigating the underlying stop and subject the individual to unjustified government scrutiny, interference, and indignity." Pet BOM 26. Defendant contends that because Officer Faulkner's request for consent to search exceeded the permissible scope of police inquiries during a traffic stop, it violated Article I, section 9's prohibition against unreasonable seizures and thus tainted the resulting evidence.

That "scope" argument—with its rigid requirement that, to be lawful, "investigatory questions" during a traffic stop must be "reasonably related to processing or investigating the underlying stop," whether or not they extend the

duration of the motorist's detention beyond that associated with the traffic stop—asks this court to invalidate the "unavoidable lull" rule, at least with respect to the request for consent to search at issue in this case. This court should reject defendant's argument because his proposed "subject-matter scope" rule conflicts with this court's well-settled test for determining whether a person has been seized for purposes of Article I, section 9, and depends on a concept of "liberty" that this court never has embraced in this context.

The validity of defendant's proposed rule depends on the validity of his expansive definition of the word "liberty" in *Backstrand*'s test for seizure of a person under Article I, section 9 (which comes from *State v. Ashbaugh*, 349 Or 297, 244 P3d 360 (2010)).[11] According to defendant, "liberty," as used in *Backstrand*, includes not only "freedom of movement" but also "freedom from unjustified government scrutiny and indignity." Pet BOM 18. He contends that, because unrelated investigatory questions during a traffic stop subject the detained motorist to "unjustified government scrutiny and indignity," such questions result in a seizure of the motorist beyond the seizure effected by the

[11] As noted, under *Backstrand*, a person is seized only if, under the totality of the circumstances, "a reasonable person [would] believe that a law enforcement officer [has] intentionally and significantly restricted, interfered with, or otherwise deprived the individual of his or her liberty or freedom of movement." 354 Or at 399 (citing *Ashbaugh*, 349 Or at 316).

traffic stop. And that additional or greater seizure, defendant posits, is unconstitutional for want of any articulable justification.

Defendant cites no decision from this court that has interpreted "liberty" the way he does in the context of applying *Backstrand*'s seizure test. Although this court has once, when discussing Article I, section 9, observed that "[t]he interest in the freedom of movement on the streets and the attendant interests of privacy and human dignity deserve the most careful constitutional protection," *City of Portland v. James*, 251 Or 8, 15, 444 P2d 554 (1968), it has never held that a person is seized under Article I, section 9, when the government infringes the person's "freedom from unjustified government scrutiny and indignity." Defendant cites no such case, and the state is aware of none.

Defendant is not helped by *State v. Campbell*, 306 Or 157, 170, 759 P2d 1040, 1047 (1988), which he cites for the proposition that "[a] privacy interest, as that phrase is used in this court's Article I, section 9, opinions, is an interest in freedom from particular forms of [government] scrutiny." Pet BOM 19. Government infringement of a privacy interest is, for Article I, section 9's purposes, a *search*, not a seizure. *See State v. Meredith*, 337 Or 299, 303, 96 P3d 342 (2004) ("Under Article I, section 9, a search occurs when the government invades a protected privacy interest."). Defendant's argument is that Officer Faulkner's request for consent constituted an unlawful seizure, not an unlawful search.

Furthermore, it appears that this court has never used the word "indignity" in conjunction with applying Article I, section 9's prohibition against unreasonable seizures. To the extent that defendant is suggesting that his proposed "indignity" test can be found in *Terry*, which he cites as support for that test (Pet BOM 18-19), the *Terry* Court talked about "indignity" not with respect to the temporary *seizure* of a person, but only with respect to the "frisk" (*search*) aspect of its holding in that case:

> [I]t is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty *indignity*." It is a serious intrusion upon the sanctity of the person, which may inflict great *indignity* and arouse strong resentment, and it is not to be taken lightly.

Terry, 392 US at 17 (footnotes omitted; emphasis added). And since *Terry*, the Court has emphasized "indignity" and "human dignity" more often with respect to the Fourth Amendment's protection against unreasonable searches, than with respect to its prohibition of unreasonable seizures. *See*, *e.g.*, *Winston v. Lee*, 470 US 753, 760, 105 S Ct 1611, 84 L Ed 2d 662 (1985) (in holding that surgical intrusion into robbery suspect's chest to recover bullet fired by victim was an unreasonable search, Court emphasized that "the overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State" (brackets and internal quotation marks

omitted)). Moreover, when the Court has used those terms in discussing the seizure of a person, the seizure was an arrest, not an investigatory stop. *See, e.g.*, *Maryland v. King*, 569 US 435, 464, 133 S Ct 1958, 186 L Ed 2d 1 (2013) (in holding that search using buccal swab to obtain defendant's DNA sample after arrest for serious offense was reasonable under Fourth Amendment, Court observed that "[a] brief intrusion of an arrestee's person is subject to the Fourth Amendment, but a swab of this nature does not increase the indignity already attendant to normal incidents of arrest"); *but see New York v. Earl*, 431 US 943, 947-48, 97 S Ct 2663, 53 L Ed 2d 263 (1977) (Burger, C.J., dissenting from denial of certiorari) ("An individual confronted in the middle of the night by a police officer holding a handgun and ordering him to 'freeze' suffers an affront to his liberty and dignity interests protected by the Fourth Amendment.").

And even if defendant's proposed "indignity" test were a proper test for determining whether police have seized a person under Article I, section 9, it is difficult to see how Officer Faulkner's mere request for consent to search significantly increased the indignity already attendant to the normal incidents of a traffic stop (whatever level of indignity that might be)—such that the request itself would be constitutionally significant. *See, e.g.*, *Pennsylvania v. Mimms*, 434 US 106, 111, 98 S Ct 330, 54 L Ed 2d 331 (1977) (*per curiam*) ("Not only is the insistence of the police [that a motorist stopped for a traffic infraction exit her or his car] not a serious intrusion upon the sanctity of the person, but it

hardly rises to the level of a petty indignity." (internal quotation marks omitted)); *compare Bennett v. City of Eastpointe*, 410 F3d 810, 839 (6th Cir 2005) ("While standing alongside one's car during a traffic stop is only a minor inconvenience and not a serious intrusion on the sanctity of the person, we think that detention in the back of a police car involves the same, if not more serious intrusion on the sanctity of the person, which may inflict great indignity, and arouse strong resentment, and it is not to be undertaken lightly." (internal quotation marks and citations omitted)).

In all events, contrary to defendant's suggested definition of "liberty," this court has always understood the word as simply an alternative to the word "freedom" in the phrase "freedom of movement," as used by this court to define an Article I, section 9, seizure of a person. "Liberty of movement" is used interchangeably with "freedom of movement" when analyzing whether police have seized a person. *See, e.g., State v. Fair*, 353 Or 588, 594 n 3, 302 P3d 417 (2013) ("The constitutional standard for a seizure was originally announced in *Holmes* and included consideration of the citizen's subjective belief that police were depriving the citizen of her or his *freedom or liberty of movement*" (emphasis added)); *State v. Hall*, 339 Or 7, 19, 115 P3d 908 (2005) (no Article I, section 9, seizure, as the officer's "initial actions of stopping his vehicle next to defendant and then gesturing for defendant to approach him did not intrude upon defendant's *liberty of movement*" (emphasis added)); *Rodgers/Kirkeby*,

347 Or 621-22 (discussing "liberty" and "liberty interests protected by Article I, section 9," solely in terms of "freedom of movement"). Defendant gives this court no good reason to modify its view of what "liberty" means in this context.

Finally, to the extent that defendant is arguing that Justice Brewer's concurring opinion in *Highley* provides the pathway for this court's adoption of defendant's proposed "subject-matter scope" rule, it does not. As defendant notes, in that opinion Justice Brewer expressed his concern "about the prevalence of routine consent searches in traffic stops" and his view that "some state courts have increasingly looked to their own state constitutions to set more meaningful limits on police activity during traffic stops"—such as "flatly forbid[ding] the police from posing questions or requests that are unrelated to the underlying reason for the traffic stop." *Highley*, 354 Or at 482 (Brewer, J., concurring in judgment). In Justice Brewer's view, traffic-stop requests for consent to search "that are not animated by an articulable justification" constitute an "unreasonable intrusion" because such an inquiry "would not be acceptable in an ordinary social interaction." *Id*. at 483, 484. Accordingly, in *Highley*, he "would conclude that [a police officer]'s request for consent to search [the] defendant amounted to a seizure for purposes of Article I, section 9," and "[b]ecause there was no articulable justification for the seizure, [he] also would conclude that it was unlawful." *Id*. at 484.

Justice Brewer, however, acknowledged that this court's decision in *State v. Ashbaugh*, 349 Or 297, 244 P3d 360 (2010), "settle[d] those issues in a different way." *Highley*, 354 Or at 485 (Brewer, J., concurring in judgment). Accordingly, based on "a proper respect for the principles of *stare decisis*," he concurred with the majority opinion's conclusion that the officer's request for consent had not seized the defendant. *Id*. In short, he correctly recognized that, under this court's Article I, section 9, case law, a mere request for consent to search, even though not reasonably related to the reason for the police-citizen contact and unsupported by any articulable justification, does not seize a person. That is so because the request does not "exceed[] ordinary social boundaries." *Highley*, 354 Or at 468, 473.[12]

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[12] The majority opinion and Justice Brewer's concurring opinion in *Highley* also defeat defendant's possible argument that an officer's request for consent to search during a traffic stop increases the "intensity" of the stop to such a degree that the stop is elevated from a traffic stop to some sort of greater Article I, section 9, seizure that requires independent, constitutionally sufficient justification. But if a request for consent to search does not elevate a "mere encounter" or "mere conversation" to a stop under Article I, section 9, because the request does not exceed ordinary social boundaries (the situation in *Highley*, 354 Or at 468, 473, and *Ashbaugh*, 349 Or at 316-17), it is difficult to see how the request would elevate a traffic stop to some greater seizure with independent Article I, section 9, significance. The request for consent has the same status in both the mere encounter and traffic stop settings: it does not exceed ordinary social boundaries.

If defendant is arguing that the request for consent intensifies the traffic stop in a way that puts greater pressure on the detained motorist to cooperate, *i.e.*¸consent to the requested search, that goes only to the issue whether the consent the motorist might give is voluntary, not whether the request itself has

Footnote continued…

For all of the foregoing reasons, this court should reject defendant's proposed "subject-matter scope" rule. It simply cannot be squared with this court's Article I, section 9, seizure jurisprudence.[13]

CONCLUSION

This court should affirm the decision of the Court of Appeals and the trial court's judgment.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
BENJAMIN GUTMAN
Solicitor General

/s/ David B. Thompson
DAVID B. THOMPSON #951246
Senior Assistant Attorney General
david.b.thompson@doj.state.or.us

Attorneys for Plaintiff-Respondent
State of Oregon

(…continued)
created a seizure with Article I, section 9, significance independent of the traffic-stop seizure. The voluntariness of defendant's consent is not at issue.

[13] This court's rejection of defendant's proposed rule will not leave defendant, or anyone else with similar concerns about the propriety of unrelated inquiries that police officers make during routine traffic stops, without a possible solution. The legislature is free to define the permissible scope of police activities during routine traffic stops, just as it already has done in ORS 810.410. The legislature also is free to provide whatever remedy it deems appropriate for an officer's violation of statutorily-imposed limits.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on February 1, 2019, I directed the original Brief on the Merits of Respondent on Review, State of Oregon, to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest G. Lannet and Joshua B. Crowther, attorneys for petitioner on review, and Rosalind M. Lee, attorney for amicus curiae, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 7,961 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(3)(b).

/s/ David B. Thompson

DAVID B. THOMPSON #951246
Senior Assistant Attorney General
david.b.thompson@doj.state.or.us

Attorney for Respondent on Review
State of Oregon

DBT:kw5/9425163